United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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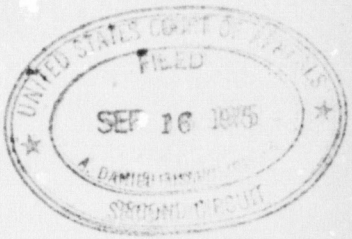
75-7056

United States Court of Appeals

For the Second Circuit.



SECURITIES & EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

SAMUEL H. SLOAN, Individually and d/b/a
SAMUEL H. SLOAN & CO.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

Appellants' Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES & EXCHANGE COMMISSION

Plaintiff-Appellee

-against-

75-7056

SAMUEL H. SLOAN, Individually and d/b/a/
SAMUEL H. SLOAN & CO.

Defendant -Appellant

BRIEF OF THE APPEALLANTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court below, Ward, J., abuse its discretion in ordering that the defendant be temporarily restrained?

2. Did the Court below, Griesa, J., abuse its discretion in extending the temporary restraining order?

3. Did the Court below, Ward, J., err in ordering that the defendant be enjoined?

4. Does the decision and order of Judge Ward fail to comply with Rules 52(a) and 65(d) of the F.R. Civ. P.?

5. Was this action assigned to Judge Ward in contravention of Rule 4(a) of the Calendar Rules for the Southern District of New York?

6. Did Judge Ward err in refusing to recuse himself from this case?

7. Did the Court below, Ward, J., abuse its discretion in directing the parties not to issue any press or litigation releases concerning this action?

8. Does the complaint state a claim on which relief can be granted?

9. Does the Securities & Exchange Commission possessthe standing to sue?

10. Is the existance of the Securities & Exchange Commission repugnant to the constitution?

11. Did the Securities & Exchange Commission fail to join a necessary party, namely, the National Quotation Bureau, Inc.?

12. Did the Securities & Exchange Commission, in promulaging Rule 15c2-11, exceed the statutory authority provided to it in Section 15(c)(2) of the Securities Exchange Act of 1934?

13. Does Section 17(a) of the Securities Exchange Act of 1934 and S.E.C. Rules 17a-3 and 17a-4, as applied in this case, violate Sloan's rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

This case is a sequel to a previous injunction action instituted by the Securities & Exchange Commission ("S.E.C."). The decision in that action is reported as S.E.C. v Samuel H. Sloan 369 F. Supp. 996 (1974). The appeal to that prior action is presently pending in this court under U.S.C.A. docket no. 74-1436.

The relevant part of the injunction in that prior case enjoined the defendant, Samuel H. Sloan ("Sloan"), from violating S.E.C. Rules

17a-3 and 17a-4 which are the S.E.C.'s bookkeeping rules. However, the injunction in that case did not enjoin Sloan from violating Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act") which states that the "books and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission---". Thus, Sloan found himself in a position where he was required by an injunction to maintain books and records in conformity with S.E.C. Rules 17a-3 and 17a-4 but was not required by the terms of the injunction to permit representatives of the S.E.C. to see those books and records.

In August, 1973, Sloan filed an application, known as Form B-D, with the S.E.C. which sought permission to withdraw his registration as a broker-dealer (A-151)[1]. Ultimately, the S.E.C., on April 28, 1975, denied Sloan's request to withdraw as a broker dealer. In the Matter of Samuel H. Sloan Adm. Pro. File No. (3-3680). That decision forms the basis for yet another appeal to this court under U.S.C.A. docket no. 75-4087.

The instant action was commenced on the afternoon of December 30, 1975. It appears that the S.E.C. persuaded the Coordinating Clerk to assign this case to Judge Ward, the judge who had tried the prior injunction action (See A-67). Thus, this case was assigned in contravention of Rule 4(A) of the Calendar Rules for the Southern District

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1. Hereafter, references to the appendix will be designated by the letter A- followed by the appropriate page number in the appendix.

of New York which states that "all civil actions and proceedings shall be assigned by lot to one judge for all purposes."

On December 30, 1974, at 4:45 P.M. (A-49) a conference was held in the chambers of Judge Ward pursuant to an application by the S.E.C. for a temporary restraining order. Sloan appeared with his suitcase in hand as he was in route to making a scheduled 8:00 P.M. flight to Iceland (A-68). Counsel for the S.E.C. stated that it had received a letter from Sloan dated November 6, 1974 advising the S.E.C. that he would not permit any S.E.C. employee to inspect his books and records absent a search warrant (A-54). Counsel for the S.E.C. further stated that on December 26, 1974 two S.E.C. employees had gone to Sloan's apartment in Bronx, N.Y. and that Sloan had denied them access to his books and records (A-51). Counsel for the S.E.C. also stated that the S.E.C. had received "hundreds of copies of Form 211s",which is a listing application submitted to the National Quotation Bureau, Inc. ("NQB") (A-51). On this basis the S.E.C. requested that Sloan be temporarily restrained from submitting any further quotations to the NQB and that the court enter a mandatory order so that the S.E.C. may inspect Sloan's books and records to see whether he is in compliance with other provisions of the "Federal Securities laws" as well as the previous court order (A-53).

Sloan, in response, requested that the Court order that there be no litigation or press releases issued by the S.E.C. concerning the commencement of this action (A-54). The Court agreed and stated that it would enter an order to the effect that there be no press releases by either side in this litigation (A-57). Sloan then asserted that Section 17(a) of the Exchange Act was unconstitutional

because of the Fourth Amendment of the Constitution of the United States (A-60). Judge Ward observed that the constitutionality of Section 17(a) had never been ruled upon by any court (A-63). However, Judge Ward stated that the Fourth Amendment argument had been foreclosed by S.E.C. v Olsen 243 F. Supp. 338 (1975), a case in which Judge Ward had represented the defendant (A-64).

After a long colloquy, during which Judge Ward agreed to recuse himself from this case (A-80), the temporary restraining order was signed and the matter was set down for 2:15 P.M. on January 8, 1975 (A-84). Sloan agreed to cut short his trip to Iceland in order to be back on that date (A-83).

Sloan arrived back from Iceland on the morning of January 8, 1975. However, Judge Ward had changed his mind about recusing himself from this case and had gone away on vacation. This led the S.E.C. to make an application to Judge Griesa, the Part I Judge, for an extention of the temporary restraining order. This application was granted without notice. Apparently Judge Ward had called Judge Griesa on the telephone and had asked him to extend the temporary restraining order.

The return date for the extended temporary restraining order was January 17, 1975. On that date the S.E.C. offered no evidence and rested its case on affidavits submitted previously in connection with its request for a temporary restraining order. Sloan moved to dismiss and made various motions all of which were summarily denied by the Court (A-119). Sloan then called Ira Spindler, a financial analyst employed by the S.E.C. (A-121), as his first witness (A-119).

Following the examination of Spindler, to which there was no cross examination, Sloan called Selvers, an S.E.C. staff attorney, as a witness (A-144). However, the court would not permit Sloan to examine Selvers (A-144/5). The Court ruled that the affidavit of Selvers (A-32 to A-35) did not constitute any part of the S.E.C.'s case so far as its application for a preliminary injunction was concerned (A-145). Sloan then testified in his own behalf (A-150 to A-169). At the request of the Court (A-147/8) the S.E.C. did not cross examine Sloan.

Following further colloquy, the Court read its decision into the record (A-172 to A-174). The S.E.C. then handed up a proposed order of injunction with attachment annexed (A-36 to A-45) which the Court immediately signed (A-175). A conformed copy of the order was then handed to Sloan (A-176). Sloan moved for a stay pending appeal (A-176) and this motion was denied (A-177). The court recessed (A-177).

On Monday, January 20, 1975 the order of injunction was entered as a judgment by the clerk (A-38). It is from this judgment that the defendant now appeals.

Although the order was entered as a judgment, the parties and the Court have treated the order as a preliminary injunction. This has led to a bizarre sequence of events which have taken place since the "judgment" was entered. In March 1975 Sloan moved to enjoin the S.E.C. from "harassment and annoyance" of the defendant. A few days later, while traveling in upstate New York, Sloan was struck by an automobile with the result that both of his legs were broken. His doctor estimated that it would be six months before he could

walk again. About two weeks later, while Sloan was in the hospital in Plattsburgh, N. Y., the S.E.C. moved for an order holding Sloan in contempt of court. The apparent basis for this motion was that Sloan was trading securities from his hospital bed in Plattsburgh, N. Y. while failing to make his books and records available at the New York Regional office of the S.E.C. Sloan was transferred to Lynchburg, Virginia in order to convalesce from his injuries. On April 28, 1975, the S.E.C. revoked the broker dealer registration of Sloan & Co. and barred Sloan from being associated with any broker or dealer. Following this, a flurry of motion papers were exchanged. All motions were conducted by correspondence because Sloan was unable to walk. There were no court appearances. Judge Ward adopted the practice of mailing his decisions to the defendant.

First Sloan served interrogatories. The S.E.C. moved for a protective order and for an order staying discovery pending the outcome of this appeal. This motion was denied but Judge Ward directed that the S.E.C. need respond only to six of the interrogatories. Sloan moved to dismiss and to vacate the preliminary injunction on the grounds of mootness and on the other grounds previously asserted. In addition, Sloan moved that the S.E.C. be held in contempt of court because on May 6, 1975 the S.E.C. had issued a press release concerning this lawsuit in violation of Judge Ward's prohibition of such press releases. These motions were denied by the Court on July 22, 1975. On the same day, Judge Ward granted the S.E.C.'s motion to adjudge Sloan in contempt of court and denied Sloan's motion to enjoin the S.E.C. from harassment and annoyance. Judge Ward also denied Sloan's motion to vacate the permanent injunction entered in

the S.E.C.'s proposed findings of fact. Furthermore, the

S.E.C. v Samuel H. Sloan & Co. 71 Civil 2695. The four decisions on that date were as follows:

"Motion disposed of as follows:

That branch of the motion which seeks to vacate the preliminary injunction is denied for lack of jurisdiction since the validity of the injunction is presently before the Court of Appeals.

That branch of the motion which seeks to hold plaintiff, its Commissioners and other employees in contempt of court is denied. The releases in question did not violate this Court's oral order of December 31, 1974. The order, granted in response to defendants' application for a restraint on the issuance of press releases "with regard to the commencement of this action" did not prohibit releases such as those issued here, describing "the end work product."

The remaining branches of defendants' motion, some of which have heretofore been denied, have all been reconsidered and, upon reconsideration, are in all respects denied.

So ordered." signed, Robert J. Ward, U.S.D.J.

"In view of the revocable nature of the sanction imposed by the Securities and Exchange Commission (Hanly v Securities and Exchange Commission, 415 F. 2d 589, 598 (2d Cir. 1969), and in view of what this Court considers the substantial probability that the violations to which the permanent injunction was addressed may be repeated, defendant's motion to vacate the permanent injunction and for other relief is in all respects denied.

It is so ordered." signed, Robert J. Ward, U.S.D.J.

"Defendant Samuel H. Sloan ("Sloan") has wilfully violated the preliminary injunction entered on January 17, 1975 and served personally upon him on that date. Sloan has refused to permit inspection of his books and records by representatives of the Securities and Exchange Commission ("the Commission") as directed by the Court and has indicated that he will continue to do so.

Accordingly, the Commission's motion to adjudge Sloan in contempt of this Court is granted and Sloan in adjudged in civil contempt. In view of his physical condition, the Court will not at this time order his imprisonment or impose a fine but will instead direct that Sloan's books and records be removed to a place where they may be inspected by representatives of the Commission as directed in the preliminary injunction.

Settle order on notice." signed, Robert J. Ward, U.S.D.J.

"Motion denied.

So ordered." signed, Robert J. Ward, U.S.D.J.

Sloan then moved for Judge Ward to recuse himself from this case, for the case to be transferred to the Western District of Virginia, Lynchburg Division, and for reargument, a hearing and a jury trial on the S.E.C.'s motion for contempt. In his moving affidavit Sloan asserted that he had not submitted any papers in opposition to the contempt motion because he was incapicated at the time this motion was made and because he was of the opinion that he could not be adjudged in contempt absent an evidentiary hearing and/because S.E.C. counsel had indicated that he would not have to appear in court on the contempt motion. The motion was denied by Judge Ward on August 18, 1975.

The present posture of this case is that the S.E.C. has filed a "notice of settlement" which is to be presented to the court on August 29, 1975. The proposed order states in part:

> "ORDERED, that defendant Sloan appear before this Court on the day of , 1975, at o'clock in the noon, in Room of the United States Courthouse, Foley Square, New York, New York, for sentencing and it is further
>
> ORDERED that, in the event the defendant Sloan fails to appear before the Court on the date above indicated, the Commission is authorized to serve a certified copy of this Order of Civil Contempt upon the United States Marshal, and the United States Marshal shall, upon receipt of a certified copy of this Order of Civil Contempt, arrest Samuel H. Sloan and confine him to the Federal House of Detention, New York, New York, until he permits immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co.
>
> Dated: New York, New York , 1975"

As a consequence, this brief is being written with a sense of urgency because, unless the defendant-appellant finishes this brief and sends it to the printer quickly, he is likely to find himself

in the Federal House of Detention in which case his brief writing activities will be aborted and it will not be possible for him to perfect this appeal. As will be seen, the defendant-appellant does not "hold the keys to his freedom in his pocket" and, at present, it appears that there is no way that he can purge himself of this supposed "contempt."

SUMMARY OF ARGUMENT

This action was not properly assigned to Judge Ward. Judge Ward displayed bias and prejudice from the very moment of the commencement of this action. Judges are not fungible and Sloan had every right to object to the assignment procedures used in this case. Judge Ward abused his discretion in granting the temporary restraining order. The language of this order, particularly the "mandatory injunction" which ordered Sloan to permit immediate examination in an easily accessible place of his books and records, constituted a virtual final adjudication of this lawsuit on the merits. Judge Griesa also abused his discretion by "extending" the life of the temporary restraining order for another ten days particularly since this order was "extended" without notice to Sloan. Rule 65(b) F.R. Civ. P. provides that a temporary restraining order has a life of ten days. To extend the order in this case had the effect of nullifying Rule 65(b) F.R. Civ. P.

Judge Ward was correct in ordering that neither party issue any press releases concerning this action. The S.E.C. should not be permitted to litigate lawsuits in the press as it does in cases such as this. However, Judge Ward erred in refusing to recuse himself from

this case particularly since this action was not properly assigned to him in the first instance. At the so-called "hearing" on January 17, 1975 Judge Ward repeatedly displayed bias and prejudice against the pro se defendant and failed to administer justice "without respect to persons" thereby violating the oath prescribed by 28 U.S.C. 453. At the so-called hearing Judge Ward abused the powers of his office in just about every imaginable way.

This action should have been dismissed for failure to state a claim. The complaint consists of nothing more than conclusory allegations of violations of S.E.C. rules. The complaint is almost completely devoid of factual content and lacks legal significance. Furthermore, a "mandatory injunction" is not a proper remedy in the circumstances of this case. If there is a remedy, that remedy is mandamus. In addition, this action to the extent that it seeks an order enjoining violations of Section 17(a) and Rule 17a-4 is barred by res judicata and estoppal. The S.E.C. had just finished spending three years in a successful prosecution of a prior lawsuit to enjoin Sloan from violations of the same section and rules and was barred from commencing a second action seeking relief identical to the relief sought in the first action.

At the so-called hearing, the S.E.C. offered no evidence, by affidavit or otherwise, that Sloan had made any use of the means or instrumentalities of interstate commerce. Furthermore, the affidavits submitted by the S.E.C. in this case were wholly sufficient and they were all based, at least in part, on "information and belief." The affidavits referred to obvious hearsay since they were based principally upon "information received from the National Quotation Bureau."

Sloan should not be required to respond to affidavits which make statements which would be inadmissible in a court of equity. Sloan has a constitutional right to confront his accusers and the court should not make use of affidavits based upon "information and belief" to deprive Sloan of his liberty and property.

The S.E.C. failed to join a necessary party, namely, the NQB. The only thing Sloan had done was to submit "listing applications", a perfectly proper procedure. The real party at interest in this case was not Sloan but the NQB. Instead of joining the NQB as a party, the S.E.C. abused the judicial process by obtaining an injunction against Sloan and then serving a copy of this injunction on the NQB thereby, according to the S.E.C., bringing the NQB within the contempt powers of the court.

The S.E.C.'s claim of a right to general access to Sloan's books and records was barred by the Fourth Amendment. The S.E.C. attorneys stated that they wanted to examine Sloan's books and records to see if he had violated the prior injunction. It is well established that the Fourth Amendment prohibits such a general search and seizure. The S.E.C. had no right to examine Sloan's books and records in any case because Sloan had filed a request with the S.E.C. to withdraw his broker dealer registration and the S.E.C. had refused this request. By requiring Sloan to continue his broker dealer registration and by claiming that Sloan was required to maintain books and records against his will, the S.E.C. was subjecting Sloan to slavery or involuntary servitude.

The S.E.C. fails to possess the requisite standing to sue. There is nothing in the constitution which authorizes the creation of an independent regulatory body. There is nothing in the constitution which gives the Government the right to harass it's citizens with civil litigation. The S.E.C. has legal and administrative remedies available and should not be permitted to prosecute this suit.

The S.E.C. exceeded its statutory authority in promulgating S.E.C. Rule 15c2-11. Section 15(c)(2) of the Exchange Act, upon which Rule 15c2-11 is based, only gives the S.E.C. the authority to define which acts and practices are fraudulent, deceptive or manipulative and which quotations are fictitious. Rule 15c2-11 fails to do this. Instead Rule 15c2-11 requires broker dealers who wish to trade in a security to submit listing applications and to perform a variety of burdensome tasks which are not contemplated by Section 15(c)(2) of the Exchange Act. There is no allegation in the complaint that Sloan engaged in a fraudulent, manipulative or deceptive practice or that he submitted a fictitious quotation. If the courts permit the S.E.C. to prevail in this lawsuit the result will be to give the S.E.C. a sort of licensing power where by the S.E.C. will be able to decide for arbitrary reasons or for reasons of its own which securities the S.E.C. will permit to be listed in the pink sheets published by the NQB. The S.E.C. already, in effect, possesses this power because of its ability to use strong arm tactics and coercive techniques to prevent brokers and dealers from listing securities in the pink sheets. The S.E.C. accomplishes this purpose by adopting the practice of calling brokers on the telephone and threatening to commence proceedings against them if they do not withdraw their listings for selected securities. The language of Rule 15c2-11 is such

in danger of suffering any injury because of Sloan's

that, as a practical consequence, almost any quotation submission could possibly be in violation of some aspect of this rule. The effect of the rule is to give the S.E.C. the arbitrary power to decide which securities it wants to be traded and which securities it does not want to be traded. No body of the Government should possess this blanket type of power.

The decision of the court, read into the record, fails to make any findings of fact which meet the requirements of Rule 52(a) F.R. Civ. P. Furthermore, the order of injunction makes no pretense of complying with Rule 65(d) F.R. Civ. P. There can be no doubt that this action must be remanded for this reason alone. However, the record in this case is such that the court could make no findings of fact.

The complaint should be dismissed. The S.E.C. has had a full and fair opportunity to prove its case and has failed to do so. The S.E.C. should not be permitted to come back to court again and again with the same basic complaint when it has failed to offer any competent proof in support of its claims. Furthermore, Sloan should be awarded costs including reasonable attorneys fees. The S.E.C. has acted vexatiously, wantonly, in bad faith, and for oppressive reasons. Sloan has been greatly prejudiced by the actions of the S.E.C. thus far in this suit and the courts should not express approval for the way the S.E.C. has proceeded in this case by failing to award costs.

ARGUMENT

POINT I

THIS ACTION WAS NOT PROPERLY ASSIGNED TO JUDGE WARD.

Rule 4(A) of the Calendar Rules for the Southern District of New York states:

> "All civil actions and proceedings shall be assigned by lot to one judge for all purposes."

Rule 13 of the Calendar Rules for the Southern District of New York states:

> "If it appears from the information and designation sheet that an action or proceeding is related to one previously commenced, or that any one or more actions filed simultaneously (a) arise from the same or substantially identical transactions, happenings, or events, or (b) for any other reason would entail substantial duplication of labor if heard by different judges, the Coordinating Clerk shall make a report respecting the related cases to the judges concerned at the earliest date practicable. If the judges concerned agree that the cases are related, the newer case (high docket number) shall be assigned to the same judge to whom the older case (low docket number) was assigned. If the judges concerned differ as to whether the cases are related, the issue shall be decided by the Assignment Committee."

Furthermore, Rule 19 of the Calendar Rules for the Southern District of New York states:

> "Once an action, civil or criminal, has been assigned to a judge, it shall not be transferred or reassigned to another judge, except in accordance with these rules.
>
> When a case is transferred, except under Rules 10, 11, 12, 15, 17, and 18, the transferor judge shall be assigned one more and the transferee judge one less case requiring, in the opinion of the Assignment Committee, a like amount of work and effort."

This case was not assigned according to the procedure prescribed by these rules. One reason for this is that in practice in the Southern District of New York the plaintiff fills out a praecipe which provides him with a place to designate "pending related cases." If the Coordinating Clerk determines that there is a pending related case before the court, he assigns the new case to the same judge before whom the pending related case is pending.

At this point, a little history is appropriate. In June, 1974, Sloan commenced an action entitled Sloan v S.E.C., 74 Civil 2792. This action was assigned to Judge Griesa. The complaint alleged that §§ 15(c)(5) and 19(a)(4) of the Exchange Act were unconstitutional. These sections give the S.E.C. the power summarily to suspend trading in a security. The complaint also alleged that Rule 15c2-11 was unconstitutional and that the S.E.C. had exceeded its statutory authority in promulgating this rule. The complaint requested declaratory relief declaring any restraint on the trading of a particular security to be unconstitutional.

At a pre-motion conference in September, 1974, counsel for the S.E.C., Thomas L. Taylor, III, urged that Sloan had no standing to raise the issues in the complaint and that the questions Sloan sought to raise were moot because Sloan had not attempted to list any securities in the pink sheets and therefore was not aggrieved by any rules or orders of the S.E.C. Judge Griesa examined the complaint and declared that it would be dismissed with leave to replead. Subsequently, Sloan filed an amended complaint which joined as new defendants the NQB, publisher of the "pink sheets," and Bunker Ramo Corp. and the National Association of Securities Dealers, Inc., operators of NASDAQ, an electronics quotations system. The amended complaint included a prayer for not only declaratory and injunctive relief but for money damages. The answer of the S.E.C. to the amended complaint, which was filed on December 10, 1974 after the S.E.C. had obtained two extentions of time to answer, asserted as a third affirmative defense that Sloan had failed to seek relief from the orders or rules challanged in the complaint.

The law of standing requires that a federal plaintiff must allege

Following the filing of this answer, Sloan submitted to the NQB "listing applications" for approximately 350 securities (A-28) almost all of which had been suspended from trading by the S.E.C. Ira Spindler ("Spindler") a financial analyst employed by the S.E.C. then called Sloan on the telephone and requested that Sloan "withdraw" his listing applications. However, Sloan did not withdraw his listing applications. Following this Spindler and Thomas Dolan ("Dolan") went to Sloan's apartment in the Bronx and asked to examine his files including his "due dilligence" file on the securities he was seeking to list in the pink sheets. Sloan denied this request. Subsequently, a series of telephone conversations took place between Sloan and S.E.C. staff counsel Jerome Selvers ("Selvers") during which Selvers indicated that the S.E.C. was going to institute suit against Sloan. Sloan stated that the proper procedure would be for the claim of the S.E.C. to be asserted in the form of a counterclaim in the existing lawsuit which was pending before Judge Griesa. Sloan further stated that if the S.E.C. insisted on instituting a new suit, he would ask the Coordinating Clerk to assign this new suit to Judge Griesa and he would request that Judge Griesa treat the two suits being consolidated.

Apparently in an effort to thwart this plan, the S.E.C. asked the Coordinating Clerk to assign the new lawsuit to Judge Ward. In order to accomplish this the S.E.C. falsely represented to the Coordinating Clerk that there was a "pending related case" before Judge Ward, namely, S.E.C. v Samuel H. Sloan & Co., 71 Civil 2695. However, that case was neither pending nor related. The case was not pending because Judge Ward had entered a final judgment in that case and the judgment had been appealed to the United States Court of Appeals for the Second Circuit. The case was not related because

none of the "facts" which formed the basis of the first suit were in any way connected with the second suit. The only similarity between the two suits was to be found in the identity of the parties.

It is obvious that Judge Ward became personally involved in the assignment of this case. The procedure normally followed by the Coordinating Clerk is to look in his computer runs, which are brought up to date at frequent intervals, to see if the supposed "pending related case" is in fact open and if so to which judge the case is assigned. If there is in fact a pending related case, the assignment is automatic. However, in the case at the bar, it is apparent that the records of the Coordinating Clerk did not indicate that there was a pending related case. At this point the Coordinating Clerk, at the insistance of the S.E.C., must have called Judge Ward's chambers to see if he would take the case. There can be no doubt that the Coordinating Clerk did not act independently because judges in the Southern District of New York, with their already overcrowded dockets, are not known to be anxious to receive the assignment of new cases. Therefore, it is apparent that Judge Ward specifically requested that this case be assigned to him.

While all of this was going on, Sloan, who was at his apartment in Bronx, N.Y., was calling the office of the Coordinating Clerk and the office of the Cashier approximately once every five minutes in an attempt to thwart the efforts of the S.E.C. to have this case assigned to Judge Ward. This proved unsuccessful and Sloan never got through to the Coordinating Clerk. Ultimately, the Cashier informed Slaon that this case had been assigned to Judge Ward.

When Sloan appeared in the chambers of Judge Ward he pointed

It should be noted that by bringing an action against Sloan for

out that the case had not properly been assigned to him (A-67). He also stated that he felt that Judge Ward had displayed prejudice in the last trial and that he was going to ask that this case be assigned to another judge because he felt that he was being prejudiced by the actions of Judge Ward (T-80). Judge Ward responded by saying that he was not going to put Sloan in a position where he felt he was not having a full and fair hearing before an unbiased judge, that he was going to ask that the assignment committee reassign this case to another judge, and that he was going to proceed no further than signing the temporary restraining order (A-80).

When Sloan returned from Iceland he was informad that Judge Ward had changed his mind and had decided to stay on this case. Sloan then filed a petition for a writ of mandamus, Sloan v Hon. Robert J. Ward and Hon. Thomas P. Griesa U.S.C.A. docket no. 75-3001. In this petition, Sloan requested among other things that the Court of Appeals remove Judge Ward from this case. The petition was denied without opinion on January 15, 1975.

On January 17, 1975 Sloan renewed his request that Judge Ward recuse himself from this case (A-100). Judge Ward denied this motion in an opinion read into the record (A-102 to A-106). Since that time Judge Ward has continued to deny applications by Sloan that he recuse himself from this case.

The opinion of the Court below was in error. Judge Ward should have recused himself from this case and, in view of his refusal to do so, this Court should accomplish what Judge Ward was unwilling to do himself. In refusing to recuse himself, Judge Ward stated:

"Mr. Sloan has no standing to raise any questions concerning

findings of fact in S.E.C.

> the manner in which the internal rules governing the division of the business of this court are applied (A-105)."

This statement was erroneous. As Mr. Justice Douglas said in dissent in Chandler v Judicial Council 398 U.S. 74, 137 (1970):

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judges' emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advise and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community."

There can be no question that the S.E.C. successfully "shopped" for a judge in this case. Just prior to the commencement of this action, S.E.C. Commissioner A. A. Sommer, Jr. made a speech on the subject of increasing criminal penalties for violators of "securities laws."[2] Included in this speech was an attack on the Department of Justice for not instituting criminal proceedings at the request of the S.E.C. and an attack on the courts for doing little more than slapping the wrists of confirmed securities law violators. Commissioner Sommer advocated the imposition of "double digit" prison sentences on those who violated S.E.C. rules.

In particular, Commissioner Sommer attacked Judge Griesa. Judge Griesa had evoked the official ire of Commissioner Sommer by sentencing a former officer of Four Seasons Nursing Centers of America, Inc. to only one year in jail. Statements

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2. Quotation marks are included because the laws to which Commissioner Sommer referred were not laws but rather were S.E.C. rules.

of the character of those made by Commissioner Sommer have been held to provide the grounds for suspension from the practice of law. Re Sawyer 360 U.S. 622 (1959).

Judge Griesa was the judge to whom Sloan v S.E.C. et al 74 Civil 2792 had been assigned. If the S.E.C. had not succeeded in having its new lawsuit assigned to Judge Ward, the Complaint of the S.E.C. would have either been assigned to Judge Griesa or to a judge selected by lot. There can be little doubt that Judge Ward was more likely than Judge Griesa to accept unquestioningly the representations of the S.E.C. in an injunction action such as this one. At oral argument on February 14, 1975, in Sloan v S.E.C. et al, Judge Griesa stated (p. 4, line 10):

> "The trouble with these injunctions is that it is like rephrasing the law. In other words, everybody in the country is forbidden from operating as a broker-dealer until they comply with the law."

Based on this judicial statement, it is reasonable to assume that Judge Griesa would not have been willing to grant the extraordinary relief sought by the S.E.C. in this case without a hearing or some other appropriate showing. There is nothing in Judge Ward's decision or in any other part of the record which indicates that Judge Ward took the trouble to read S.E.C. Rule 15c2-11 or S.E.C. Rule 17a-4 that are at issue in this lawsuit. The same was true of the previous case before Judge Ward. The decision there is reported at 369 F. Supp. 996 (1974). In that decision, Judge Ward did not make a single reference to the specific language of S.E.C. Rules 15c3-1, 17a-3 and 17a-4 nor did he explain how Sloan's conduct violated these rules. It appears that Judge Ward never bothered to read the rules in question but merely copied

the S.E.C.'s proposed findings of fact. Furthermore, the decision of Judge Ward did not cite a single authority.

In dismissing the complaint before him, Judge Griesa accepted the argument of the S.E.C. that Sloan should not relitigate issues which were already being litigated before Judge Ward. Thus, by fancy manuvering, the S.E.C. was able to get the issue of the validity of S.E.C. Rule 15c2-11 placed before Judge Ward, a judge who, as will be seen, is biased and prejudiced and is also incompetent and has repeatedly violated the Code of Judicial Conduct and the oath which he was required to take prior to assuming his judicial office.

It should be noted that the "hearing" on the S.E.C.'s motion for an injunction was held on January 17, 1975 whereas the oral argument before Judge Griesa on the S.E.C.'s motion to dismiss was held on February 14, 1975 even though the lawsuit before Judge Ward was commenced on December 30, 1974 and the lawsuit before Judge Griesa was commenced on June 27, 1974. One reason for this was that the lawsuit assigned to Judge Ward was being prosecuted by the New York Regional Office of the S.E.C. That office is directly across the street from the U.S. Courthouse so that the S.E.C. attorneys in that case could walk across the street at any time and demand an immediate hearing based on some supposed dire emergency whereas the S.E.C. was defending in the action before Judge Griesa by its Washington, D.C. office of General Counsel which was in the position to make repeated requests for delays and adjournments citing the "hardship" imposed by the fact that an S.E.C. attorney had to come from Washington, D.C. every time a court appear-

456 F. 2d 509 (1st Cir. 1971).

ance was necessary.[3] In this case, the claim of hardship was merely a ploy designed for no other purpose than to obstruct justice and to frustrate the normal functioning of the courts.

This action should not have been assigned to Judge Ward in the first instance. The S.E.C. accomplished this assignment by means of fraud and deceit. Judge Ward, of course, was a participant in this fraudulent conduct. Since that time the S.E.C. and Judge Ward have actively conspired to deprive Sloan of his freedoms and liberties by unconstitutional means. See Taylor v Hayes 418 U.S. 488 (1974); Re Greene 369 U.S. 689 (1962); Re Murchison 349 U.S. 133 (1954); Re Oliver 333 U.S. 257 (1948). Clearly, conduct of this sort should not go unpunished.

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3. In truth, the S.E.C. sought to impose a hardship on Sloan. Whenever Sloan served papers on the S.E.C.'s New York Regional Office, the S.E.C. contended that this service was improper. The S.E.C. has complained to both Judge Griesa and to this Court that Sloan had improperly served the S.E.C. and that the only proper service was personal service on the Office of General Counsel in Washington, D.C. In spite of the language of Rule 4(a) of the General Rules of the Southern District of New York, which requires that the S.E.C. maintain an agent for service in New York City, the S.E.C. has used this claim as a pretext for further procrastination and delay.

POINT II

THE S.E.C. LACKS STANDING TO SUE BECAUSE IT IS NEITHER A PURCHASER NOR A SELLER OF SECURITIES AND BECAUSE THE EXISTANCE OF AN INDEPENDANT REGULATORY AGENCY SUCH AS THE S.E.C. WHICH IS NOT PART OF THE EXECUTIVE, LEGISLATIVE OR JUDICIAL BRANCHES OF THE UNITED STATES GOVERNMENT BUT WHICH POSSESSES THE COMBINED POWERS OF ALL THREE BRANCHES OF THE GOVERNMENT IS REPUGNANT TO THE CONSTITUTION.

The S.E.C. and the Federal Reserve Board constitute part of what has come to be characterized as the "fourth branch of government."[4] The commissioners are not answerable to either the President or the Congress. In fact, the commissioners appear to maintain that they are not answerable even to the courts. In Sloan v S.E.C., supra the S.E.C. maintained that it possesses a sovereign immunity from suit.

The starting point must be that federalism is a constitutional concept. Jennings v Boenning & Co. 482 F. 2d 1128 (3rd Cir. 1973).

> "The constitution of the United States recognizes and preserves the autonomy and independance of the States." Erie RR v Tomkins, 304 U.S. 64 at 78 (1938) quoting from Mr. Justice Field in Baltimore & Ohio RR v Baugh, 149, U.S. 368, 401 (1893).

In this case, Congress has taken a right which had previously been reserved to the states and has vested it in an independant regulatory body. In fact, Congress recently passed legislation which establishes an Environmental Protection Agency and a Consumer Product

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4. See "Our Rotting 'Fourth Branch'", July, 1975 Readers Digest; "Government Airline Regulations - Needless Risk at High Rates", June, 1975 Readers Digest; "Too Much Government by Decree!" May, 1975 Readers Digest; "Highway Robbery via the ICC", January, 1975 Readers Digest. It is apparent from these articles that a major segment of society is not particularly satisfied with the performance of this so-called "fourth branch" of government.

(1938); Ex parte Fahey 332 U.S. 258 (1947); Cruickshank v

Safety Commission with powers similar to that of the S.E.C. The creation of these new agencies will necessarily lead to a totally regulated economy. If this trend is allowed to continue, the concept of federalism will soon become a dead letter.

As every high school student of history knows, the Constitution establishes the doctrine of "Separation of Powers." That doctrine was affirmed by Marbury v Madison 5 U.S. (1 Cranch) 137 (1803). One purpose of the doctrine of separation of powers is to prevent too much power from being in the hands of any division of the government. As James Madison stated in The Federalist No. 47:

> "The accumulation of all powers, legislative, executive and judiciary, in the same hands whether of one, a few, or many, and whether hereditary self-appointed, or elective, may justly be pronounced the very definition of tyranny."

What the Congress has done here is to create a tyrannical and despotic government agency. This agency has the power to make laws (i.e. the S.E.C. rules and regulations), to enforce its own laws (by commencing and prosecuting administrative and judicial proceedings), and to sit in judgment as to whether its own laws have been violated (by entering orders of the S.E.C.). Recently, the S.E.C. has barred the petitioner for life from being associated with any broker or dealer (Exchange Act Release No. 11376 dated April 28, 1975, petition for review filed U.S.C.A. docket No. 75-4087) because he dared to challenge the validity and the constitutionality of various S.E.C. rules.

In its 40 years of existance, the S.E.C. has never sustained a serious legal setback primarily because of its ability to crush

clear from submitting any quotations to the NQB. However, this

opposition mercilessly. It is hard to imagine an individual in the securities industry who does not live in constant fear of the S.E.C. The fictional Big Brother created in the novel 1984 has become a reality a decade ahead of schedule.

It is submitted that nowhere in the sparse language of the Constitution can one find room for the creation of an independant regulatory body. Article I, Section 1 states:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Article II, Section 1 states:

> "The executive power shall be vested in a president of the United States of America."

Article III, Section 1 states:

> "The judicial power of the United States shall be vested on one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

It is submitted that it is clear that the establishment of an independent regulatory body such as the S.E.C. is precisely what the Constitution was designed to prevent. As Mr. Justice Brandeis stated in dissent in Myers v United States 272 U.S. 52, 293 (1926):

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

Certainally, it is "efficient" for the S.E.C. to promulgate a Rule such as Rule 15c2-11 and then to come into court to prosecute alleged violations of this rule, but the question before the court is: Is it constitutional? The answer, it is submitted, is, "No."

temporary restraining orders and has done so twice in cases in-

However, assuming arguendo that by some stretch of the Constitution, the creation of the S.E.C. could be justified, it would still not have the power to interfere in a private business transaction which would be perfectly legal if the S.E.C. did not exist. The Tenth Amendment to the Constitution states:

> "The powers not delegated to the United States by the Constitution or prohibited by it to the States, are reserved to the States respectively or to the people."

The Tenth Amendment discloses the wide spread fear that the national government might, under pressure of a supposed general welfare, attempt to exercise powers which it had not been granted. Kansas v Colorado 206 U.S. 46 (1907). This widespread fear was clearly justified as federal agencies such as the S.E.C. have been created for the specific purpose of usurping powers previously assumed to be within the exclusive province of the States. Corporation Commission of the State of Oklahoma v Federal Power Commission 415 U.S. 961 (1974) (Rehnquist, J., dissenting).[5]

The S.E.C.,in its complaint, makes no allegation that the S.E.C. has purchased or sold securities. Furthermore, the S.E.C. does not complain that either the S.E.C. or the United States of America has

5. The description by Mr. Justice Rehnquist of the plight of the "Lady from Niger" is not the only result of federal regulation of state governmental activities. Dr. Clark Kerr, former Chancellor of the University of California, is credited by Time Magazine with the following limerick:

> "There was a young lady from Kent
> Who very well knew what was meant
> When asked out to dine
> With cocktails and wine
> She knew what was meant but she went."

To this, Dr. Marjorie Sloan, former director of the Lynchburg Guidance Center in Lynchburg, Virginia has added:

> "Her arrival for dining was punctual
> But her only intentions were nuptial
> So she married the fed
> With his house, board and bed
> Now the care of their children's quite sumptual."

suffered or is in danger of suffering any injury because of Sloan's activities. For that matter, at the so-called hearing, the S.E.C. made no showing that Sloan had purchased or sold any securities in connection with his supposed illegal activities. It may be that in S.E.C. v National Securities, Inc. 393 U.S. 453 (1969) the Supreme Court said that the purchaser-seller rule did not impose a limitation on the standing of the S.E.C. to bring actions for injunctive relief under §10(b) and Rule 10b-5 where a merger was involved. However, in that action the only question involved was whether a merger, as distinguished from a purchase or a sale, could form the transactional basis for a suit. In that case, the Supreme Court did not purport to adjudicate the broader constitutional questions which are being raised in this brief.[6] Furthermore, §10(b) is a general anti-fraud provision which finds its basis in common law. S.E.C. v Capital Gains Research Bureau, Inc. 375 U.S. 180, 193 (1963). There is no common law analogy to S.E.C. Rule 15c2-11 or to S.E.C. Rule 17a-4 and therefore the S.E.C. must show a compelling governmental interest in interfering in Sloan's activities. Bates v Little Rock 361 U.S. 516, 535 (1960). It is obvious that there is no compelling interest in this case. The only interest the S.E.C. has in the continuing prosecution of this lawsuit is the interest in preserving the power and authority of the S.E.C.

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6. The argument in this brief may, in some respects, conflict with the dictum of the court in Blue Chip Stamps v Manor Drug Stores _____ U.S. _____, 44 L. Ed. 2d 539, 558 n 14 (1975). However, that dictum is not controlling in this case. To the extent that that dictum conflicts with any arguments advanced in this brief, it is submitted that that dictum is erroneous.

It has been established by many Supreme Court decisions that a person has the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference. It has further been established that this right comes within the "liberty" and "property" concepts of the Fifth Amendment. Dent v West Virginia 129 U.S. 114 (1889); Allgeyer v Louisiana 165 U.S. 578, 589, 590 (1897); Schware v Board of Bar Examiners 353 U.S. 232 (1957); Peters v Hobby 349 U.S. 331, 352 (1955) (concurring opinion); Slochower v Board of Education 350 U.S. 551 (1956); Truax v Raich 339 U.S. 33, 41, 60 (1915); Powell v Pennsylvania 127 U.S. 678, 684 (1888); Greene v McElroy 360 U.S. 474 (1959).

Litigation imposes a great burden on any defendant, and the burden is particularly great where the plaintiff is a government agency. Even if the defendant prevails, the result is likely to be a phyrric victory. For example, columnist Allan C. Brownfield recently documented the case of three salt companies - Morton, International and Diamond Crystal - charged with fixing the price of rock salt. The case continued for two and a half years, ending in a jury verdict of innocent. However, the defense cost the companies an estimated $775,000, whereas the government fixed "fine" was only $150,000.

These three major corporations had the money to compile the documentation and to hire the legal counsel to defend themselves. Smaller businesses and individuals are not always so lucky. They are confronted with a government which has unlimited tax funds,

supplied in part by the defendant, and all the time in the world. With limited resources and unable to spare the time of lengthy lawsuits, smaller companies and individuals are often forced to submit and pay up or to "consent" even when they know they are innocent. In the case at the bar, Sloan spent $7,200 in counsel fees and other fees related to his defense in the first injunction action and in the related administrative proceeding prior to appearing in his own behalf. With no end to the forthcomming legal expense in sight, Sloan discharged his counsel and took up the reins of his own defense. Few defendants in litigation instituted by the S.E.C. are in a position to do this.

There is nothing in the constitution which gives the Government the right to harass it's citizens with civil litigation. The S.E.C. like any other litigant should be required to meet reasonable pleading requirements. In the case at the bar, the complaint filed by the S.E.C. does nothing to demonstrate that the S.E.C. possesses standing to sue. The Supreme Court, in Flast v Cohen 392 U.S. 83 (1968) described the element of standing as follows:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largly depends for illumination of difficult constitutional questions.' Baker v Carr, 369 U.S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question" (392 U.S. at 99-100).

The law of standing requres that a federal plaintiff must allege some actual or threatened injury to the plaintiff resulting from the putatively illegal action before a federal court may assume jurisdiction. Moose Lodge No. 107 v Irvis 407 U.S. 163, 166-167, (1972); Flast v Cohen 392 U.S. 83, 101 (1968); Baker v Carr 369 U.S. 185, 204 (1962); Linda R.S. v Richard D. 410 U.S. 614, 617 (1973); California Bankers Assn. v Shultz 416 U.S. 21, 69 (1974). Since standing is a jurisdictional requirement, a complaint which fails to allege sufficient facts to demonstrate standing must be dismissed.

Although standing may be conferred by statute, Congress may not confer jurisdiction on the federal courts to render advisory opinions. Sierra Club v Morton 405 U.S. 727, 732, n 3 (1972); Linda R.S. v Richard D., supra 410 U.S. at 617, n 3. However, §21(e) of the Exchange Act does exactly this. In the case at the bar, after Judge Griesa made his determination that the original complaint in Sloan v S.E.C. 74 Civil 2792 was to be dismissed and after the S.E.C. had filed its answer to the amended complaint in which asserted as an affirmative defense that declaratory relief was not available, Sloan submitted 350 "listing applications" to the NQB. This mooted the S.E.C.'s claim that Sloan lacked standing to challenge the validity of Rule 15c2-11 and also induced the S.E.C. to institute its own suit. In effect, what the S.E.C. has done is to come into court to seek an advisory opinion that Sloan's conduct is illegal. Consequently, under Article III, Section 2 of the Constitution, this court has no jurisdiction to try this suit because no actual case or controversy is presented.

If Sloan's conduct were of clear illegality, injunctive relief would not be available to the S.E.C., see Mitchell v Lublin, McGaughy & Associates et al 358 U.S. 207, 214 (1959), because the Government would have the "legal" remedy of bringing a criminal prosecution against Sloan.[7] However, in a criminal prosecution, Sloan would enjoy the Sixth Amendment right to a speedy trial by an impartial jury; a right which, according to the S.E.C., Sloan does not possess in an injunction action (A-57). By coming into court with a civil suit to enjoin Sloan from doing in the future what he has done in the past the Government is estopping itself from bringing a criminal prosecution based upon the same "facts." United States v Parrott 248 F. Supp. 196 (1965). This is unconstitutional since only the President has the power to grant pardons. United States Constitution, Artical II, Section 2, paragraph 1. It has long been established that the extraordinary remedy of injunctive relief will not be permitted where the law offers adequate protection. Wilson v Shaw 204 U.S. 24 (1907). Thus, by alleging that Sloan has violated"the law", the S.E.C., as an agency of the Government, has made an allegation which requires that the remedy of injunctive relief be denied. In sum, if the Court permits the prosecution of this action to proceed, the result will be to deprive the defendant of his constitutional rights. S.E.C. v Coffey 493 F. 2d 1304, (6th Cir. 1974) cert. denied _____U.S._____, 42 L.Ed. 2d 837 (1975).

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7. However, injunctive relief would be available to a private party since a private party does not have the "legal" remedies available to the Government.

arguments for or against a preliminary [illegible] can proceed

It should be noted that by bringing an action against Sloan for injunctive relief, while abstaining from instituting any criminal prosecution, the Government has made a tacit admission that no jury would be likely to convict Sloan for his alleged wrongdoing.[8] By admitting that Sloan could not be convicted by a jury, the Government has, in effect, admitted that the law in question is void for vagueness. The test for vagueness is whether the law in question has established standards of guilt sufficiently ascertainable that not ment of common intelligence need/guess at its meaning. Connally v General Constr. Co. 269 U.S. 385 (1925); Winters v New York 333 U.S. 507 (1948).

The S.E.C. has deliberately proceeded via a route which puts judges rather than juries in the position of being the trier of the fact. In so doing, the S.E.C. has placed an intolerable burden on the judicial system. In the Southern District of New York, Judge Stewart has pondered the case of S.E.C. v Vesco et al for more than two years and has still not been able to file findings of fact. Likewise,

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8. To the knowledge of the defendant, no grand jury has ever been convened nor have any steps been taken by either the S.E.C. or the Department of Justice to institute criminal proceedings against Sloan. Since the S.E.C. contends that Sloan has engaged in illegal activities ever since some time in early 1971 and since the S.E.C. has nevertheless not taken any steps to institute criminal proceedings, it is obvious that the S.E.C. has no plans to do so. Furthermore, if the Government were to institute criminal proceedings at this late date based upon the charges made by the S.E.C., such a prosecution would be time barred.

Judge Gagliardi has been unable to make findings of fact in S.E.C. v D'Onofrio et al, although testimony was concluded and final briefs were filed in that case more than two years ago. Judge Stewart and Judge Gagliardi are conscientious judges and their inability to make findings of fact is demonstrative of the point that injunction actions brought be the S.E.C. do not conform to judicially managable standards. Complaints filed by the S.E.C. constitute a high percentage of all civil suits instituted in the Southern District of New York and this trend, if allowed to continue, could realistically be expected to lead to a breakdown in the judicial system. It is not within the province of the judiciary to decide matters of public interest and public policy. The complaint of the S.E.C. raises issues for which judicially manageable standards are lacking. Therefore the complaint is non-justiciable and must be dismissed. Baker v Carr, supra.

POINT III

THE COURT BELOW, WARD, J., ABUSED ITS DISCRETION IN ORDERING THAT THE DEFENDANTS BE TEMPORARILY RESTRAINED.

Simultaneous with the filing of the complaint in this action, the S.E.C. moved for a temporary restraining order. The action of the S.E.C. was almost a repeat of history since, on June 17, 1971, the S.E.C. had filed motion papers on a similar motion for a temporary restraining order against Sloan. In that case, Judge McLean granted the motion on June 23, 1971 and the S.E.C., by illegal means, used the temporary restraining order as the basis for an attachment against Sloan's account at Chemical Bank. On that occasion, Sloan had $37,999.03 on deposit with the Chemical Bank. When Sloan protested to the S.E.C., the S.E.C. offered to arrange for the return of Sloan's $37,999.03 and to drop the request by the S.E.C. for the

appointment of a receiver provided that Sloan would "consent" to an injunction. Thus, Sloan was forced to capitulate and the S.E.C. obtained an injunction which constituted a virtual adjudication of the merits of that lawsuit until that case finally came to trial two and one half years later. All of the documentation of this affair can be found in the record of the appeal to this Court of S.E.C. v Samuel H. Sloan & Co., supra.

On December 30, 1974 the S.E.C. once again applied to the court for a temporary restraining order. As before the S.E.C. requested and obtained a virtual adjudication on the merits. The circumstances of this second application for a temporary restraining order make it obvious, were it not obvious already, that counsel for the S.E.C. uses the device of a temporary restraining order as a tactical measure to beat its advesaries into submission and thereby to abuse the purpose for which the extraordinary remedy of a temporary restraining order is intended.

The purpose of a temporary restraining order,as Judge Ward himself observed (A-77), is to preserve the status quo. Sampson v Murray 415 U.S. 61 (1974); Parker v Winnipiseogee Lake Cotton & Woolen Co. 2 Black 545 (1862); Clark v Clark 17 How 315 (1854); Erhardt v Board 113 U.S. 537 (1885). Because of the interlocutory character of a temporary restraining order, such an order has generally been considered to be non-appealable unless it clearly appears that there has been an abuse of discretion or unless the order is contrary to some rule of equity. Louisville & N.R. Co. v United States 238 U.S. 1 (1915); United States v Corrick 298 U.S. 435 (1936); Alabama v United States 279 U.S. 229 (1929); National F. Ins. Co. v

Thompson 281 U.S. 331 (1930); United Fuel Gas Co. v Public Service Comm. 278 U.S. 322 (1929); Rogers v Hill 289 U.S. 582 (1933); Deckert v Independence Shares Corp. 311 U.S. 282 (1940); Prendergast v New York Teleph. Co. 262 U.S. 43 (1923). It is submitted that the case at the bar involves just the sort of abuse of discretion which makes the temporary restraining order appealable. It should be noted that in Carroll v Commissioners of Princess Anne 393 U.S. 175 (1968) the Supreme Court reversed a temporary restraining order even though that order expired by its terms more than two years before the Supreme Court made its decision.

The S.E.C.'s application for a temporary restraining order is addressed to the discretionary power of the Court and not to relief to which plaintiff is entitled as a matter of right. Yakus v United States, 321 U.S. 414, 440 (1944) and see Moore's Federal Practice ¶65.04 [1].

In seeking this extraordinary judicial remedy, the burden rests upon plaintiff (see, e.g. Inmates of Attica Correction Facility v Rockefeller, 453, F. 2d 12 (2d Cir. 1971))to fulfill the four-preconditions to the issuance of a stay in a case involving public interest which were established in this Circuit in Eastern Air Lines, Inc. v Civil Aeronautics Board, 261 F. 2d 830 (2d Cir. 1958). Since a consistently applied requisite is the likelihood that plaintiff will prevail on the merits (see, e.g. Checker Motors Corp. v Chrysler Corp., 405 F. 2d 319, 323 (2d Cir. 1969), cert. denied 394 U.S. 999 (1969)), a failure to meet this test has been deemed sufficient in and of itself to require the denial of a requested restraining order, see e.g., American Cyanamid Company v Richardson

456 F. 2d 509 (1st Cir. 1971).

In applying for the temporary restraining order, the S.E.C. requested a "mandatory order to permit an immediate examination in an easily accessible place" of Sloan's books and records (A-8). Since one of the points in contention in this lawsuit was Sloan's claim that the S.E.C. had no right to see his books and records (A-61), the issuance of a "mandatory order" constituted a virtual adjudication of that aspect of this lawsuit on the merits. Had Sloan complied with the "mandatory order" and postponed his trip to Iceland, his opportunity to assert his Fourth Amendment claim would have been virtually extinquished because, as it has been seen, the entry of a temporary restraining order is ordinarily not appealable. Furthermore, had Sloan produced his books and records on the spot, he would have left himself open for a manufactured claim by the S.E.C. that he had committed some supposed violation of the S.E.C.'s bookkeeping rules and therefore was in contempt of the courts injunction in S.E.C. v Samuel H. Sloan & Co., supra.

A case on point is NAACP v Alabama 357 U.S. 449 (1958) in which the State of Alabama obtained a temporary restraining order requiring of the NAACP the production of records. When the NAACP refused to comply with the part of the order which required the production of membership lists, it was adjudged to be in contempt of court and was fined $100,000. The Supreme Court reversed, noting that if the members of the NAACP were themselves required to assert their rights, that "would result in the nullification of the right at the very moment of the assertion." 357 U.S. at 459.

In the case at the bar, the extraordinary remedy of a temporary restraining order to require the production of records was unavailable. The parties had just concluded a three year lawsuit concerning the question of the availability of Sloan's books and records. The claim by the S.E.C. that Sloan's books and records were unavailable was nothing new. What was new was that previously Sloan had contended that his books and records were available whereas now Sloan had changed his position and was agreeing with the S.E.C. that his books and records were not available to the S.E.C. Surely, the fact that Sloan had shifted his position and was now in full agreement with the S.E.C. does not form the equitable basis for a temporary restraining order.

Furthermore, as Sloan pointed out, the S.E.C. had several other remedies available. It could have subpoenaed Sloan's records (A-66). It could have obtained a production order pursuant to the F.R. Civ. P. (A-67). It could have obtained a search warrant (A-54). It could have stopped Sloan's brokerage activities at any time by barring him from associating with a securities dealer (A-79). It could have accepted Sloan's request, which had been pending since August 16, 1973, to withdraw his broker dealer registration (A-150). Finally, it could have applied for a writ of mandamus, which, according to rulings by the S.E.C., is the proper remedy in circumstances such as these. S.E.C. v Sharkey (D.C. Wash. 1945) 4 S.E.C. Jud. Dec. 574.

It has long been established that in the federal courts an injunction will not be permitted unless alternative remedies are either inadequate or unavailable. McCabe v Atchison, T. & S. F.R. Co. 235 U.S. 151 (1914); Franklin Teleg. Co. v Harrison 145 U.S. 459

(1892); Ex parte Fahey 332 U.S. 258 (1947); Cruickshank v Bidwell 176 U.S. 73 (1900); Bankers Life & Cas. Co. v Holland 346 U.S. 379 (1953); Wilson v Shaw, supra Beacon Theatres v Westover 359 U.S. 500, 509 (1959); Sampson v Murray, supra; Moore's Federal Practice ¶32 [5]. The S.E.C. had six remedies available which it voluntarily elected not to pursue. Consequently, injunctive relief was not available.

It should be observed that from some time prior to the trial in December, 1973 until just prior to December 26, 1974, the S.E.C. had expressed no interest in examining Sloan's books and records. On November 6, 1974, although under no compulsion to do so, Sloan had written a letter to the S.E.C. advising the S.E.C. of his intention not to permit any S.E.C. employee to inspect his books and records absent the production of a search warrant (A-54). From November 6, 1974 until Thursday, December 26, 1974 the S.E.C. did nothing. Then, on Monday, December 30, 1974, counsel for the S.E.C. ran to the courthouse proclaiming that some dire emergency had arisen because of Sloan's refusal to produce his books and records. It is submitted that these facts demonstrate bad faith on the part of the S.E.C. It is obvious that the true motive which caused the S.E.C. to request the extraordinary remedy of a temporary restraining order lay in its desire to obtain an adjudication on the merits of the issues involved in this lawsuit without ever being required to go forward with proof of its claims at a trial or a hearing. In short, the application by the S.E.C. for a temporary restraining order was an abuse of the judicial process.

The S.E.C. also requested that the Court temporarily restrain

Sloan from submitting any quotations to the NQB. However, this application was inappropriate for several reasons, one of them being that the submission of quotations or listing applications was not even arguably illegal. "An injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct." United Transp. Union v State Bar of Michigan 401 U.S. 576, 584 (1971). Furthermore, as Sloan pointed out, he had already submitted all the listing applications he intended to submit to the NQB and the pink sheets for that day had already gone to press (A-75). In addition, Sloan was on his way to Iceland (A-68). What the S.E.C., in effect, really wanted Sloan to do was to "withdraw" the listing applications which he had previously submitted (A-76). This would involve an affirmative act which Sloan was unwilling to perform (A-76) and which was not required by the terms of the temporary restraining order (A-13).

Again, what was involved was an abuse by the S.E.C. of the judicial process. The purpose of the application for a temporary restraining order was not to restrain Sloan from submitting quotations to the NQB but to restrain the NQB from publication of the quotations which had previously been submitted by Sloan (A-29). The equitable way to do this would have been for the S.E.C. to join the NQB as a party defendant. In view of the decision not to join the NQB as a defendant and in view of the fact that Sloan was on his way to Iceland, the extraordinary remedy of a temporary restraining order was unavailable.

One further point should be made here which is that the interlocutory character of the temporary restraining order does not render the issues presented moot. The S.E.C. makes frequent use of

temporary restraining orders and has done so twice in cases involving Sloan. Therefore, the question of the validity of the temporary restraining order is not moot, United States v W.T. Grant Co. 345 U.S. 629, 632 (1953), particularly in view of the S.E.C.'s claim that Sloan's failure to comply with the temporary restraining order provides an additional ground for the granting of injunctive relief (A-96). If the interlocutory and/or short-term character of a temporary restraining order makes it unreviewable, then the wrong occasioned by such an order is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v ICC 219 U.S. 498, 515 (1911); Roe v Wade 410 U.S. 113, 125 (1973).

POINT IV

THE COURT BELOW, GRIESA, J., ABUSED ITS DISCRETION IN EXTENDING THE TEMPORARY RESTRAINING ORDER.

Sloan traveled nearly 3,000 miles in order to be present on January 8, 1975, the date that Judge Ward had set as the return date for the S.E.C.'s motion for a preliminary injunction (A-84). However, when he arrived, Sloan learned that Judge Ward had gone away on vacation. Normally, under these circumstances, the matter would be heard by the Part I Judge who, by coincidence, happened to be Judge Griesa.[9] Subsequently, as a result of some rather obviously ex parte and off-the-record discussions between counsel for the S.E.C. and Judge Ward and/or his law clerk, the S.E.C. applied to Judge Griesa to "extend" the temporary restraining order.

9. The Part I assignment normally rotates from one judge to another every two weeks.

"[U]nder Rule 65(b) temporary restraining orders must expire by their own terms within 10 days after entry, 20 days if good cause is shown." Granny Goose Foods v Teamsters 415 U.S. 423, 433 (1974). Undoubtedly, the term "good cause shown" does not encompass a showing that the judge is away on vacation. There are thirty judges in the Southern District of New York and any one of them would have been just as qualified and probably more qualified than Judge Ward to decide the issues in this case. In fact, any special qualifications which Judge Ward might have had to decide the motion for a preliminary injunction would come from a disqualifying source. 28 U.S.C. 455(b)(1) requires that a judge disqualify himself when he has any "personal knowledge of disputed evidentiary facts concerning the proceeding." However, from the outset, Judge Ward had indicated a readiness to decide this suit based on what he had learned during the course of the first trial before him (A-70). Therefore, Judge Ward was disqualified, rather than specially qualified, from deciding the issues in the case before him.

Canon 3(4) of the Code of Judicial Conduct of the American Bar Association states:

> "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding."

There can be very little doubt that Judge Ward violated this canon of judicial ethics several times during the course of this lawsuit. Mysterious things kept happening in this case which could not have occured without some ex parte judicial intervention. First, there was the assignment of this case to Judge Ward. Second, there was

the decision of the S.E.C. to apply for an "extention" of it's temporary restraining order. Third, there was the decision by Judge Griesa to extend the temporary restraining order without notice to Sloan. Finally, the S.E.C. came into court on January 17, 1975 seeming to know that it would be granted injunctive relief without being required to offer . . . evidence. In fact, counsel for the S.E.C. appeared to be acting at all times under instructions from Judge Ward and Judge Ward, in turn, appeared to be protecting the S.E.C. (A-144 to A-146).

In any event, Judge Griesa had no authority to grant or extend the temporary restraining order. Unlike the previous order, Judge Griesa's order was granted without notice. As the Supreme Court stated in Carroll v Commissioners of Princess Anne, supra 393 U.S. at 180:

> "There is a place in our jurisprudence for exparte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate."

This principle was affirmed in Granny Goose Foods v Teamsters, supra. There, the Supreme Court stated:

> "The stringent restrictions imposed by §17, and now by Rule 65, on the availability of ex parte temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. Ex parte temporary restraining orders are no doubt necessary in certain circumstances, cf. Carroll v Commissioners of Princess Anne 393 U.S. 175 (1968), but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing,and no longer." 415 U.S. at 439

In footnote 14, the Supreme Court stated:

> "See, e.g., Pan American World Airways v Flight Engineers' Assn. 306 F. 2d 840 (2d Cir. 1962); Smolderman v United

States 186 F. 2d 676 (10th Cir. 1950); Sims v Greene 161 F. 2d 87 (3rd Cir. 1947). This basic purpose is implicit in Rule 65(b)'s requirement that after a temporary restraining order is granted without notice, ' the motion for a preliminary injunction shall be set down for a hearing at the earliest possible time and takes precedence of all matters except older matters of the same characters.....' "

It is apparent from this that Judge Griesa abused his discretion in extending the temporary restraining order. Irrespective of the wishes of Judge Ward, Judge Griesa simply did not have the authority to extend the temporary restraining order. In fact, it was the duty of Judge Griesa, as the Part I Judge,[10] to conduct an immediate hearing on the S.E.C.'s motion for a preliminary injunction. In view of the S.E.C.'s failure to go forward with its application for a preliminary injunction, Judge Griesa should have dissolved rather than extended the temporary restraining order.[11]

The remedy of a temporary restraining order without notice was unavailable for another reason because Rule 65(b) requires that such an order may be granted without notice only where:

"it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition. .." (emphasis supplied).

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10. Part I is the special emergency calendar part which is assigned the task of hearing matters involving applications for interim and emergency relief. Specifically, Part I hears such applications when the judge to whom the case is regularly assigned is unavailable. Thus, Part I was created to provide for the contengency which might arise when, as here, the regular judge is away on vacation.

11. Actually, this would have been unnecessary since the temporary restraining order would have expired by its own terms on January 8, 1975 (A-83).

In the case at the bar, the S.E.C. made no showing that irreparable injury will result "to the applicant." Therefore, except in the unlikely circumstance of the S.E.C. alleging that the S.E.C. itself is threatened with irreparable injury, the S.E.C. can never be granted a temporary restraining order without notice.

POINT V

JUDGE WARD LACKED THE AUTHORITY TO GRANT AN INJUNCTION BECAUSE NO PROPER EVIDENTIARY HEARING HAD BEEN HELD.

When the return date for the S.E.C.'s motion for a "preliminary and permanent injunction" finally arrived, the S.E.C. failed to elicit testimony. Instead, Mr. Selvers, counsel for the S.E.C., made a speech about what a bad person Sloan was and sat down (A-92 to A-98). At this point, the following colloquy took place:

MR. SLOAN: Am I to understand the Commission has rested its case at this point?

THE COURT: They have made their case and you may now proceed.

MR. SLOAN: Your Honor, my understanding today was that there was supposed to be an evidentiary hearing.

THE COURT: You may produce any witnesses you want. I told you that, and I understood you were going to produce one witness. You may proceed.

MR. SLOAN: Your Honor, I spoke to the Securities and Exchange Commission within the last couple of days asking them if they intended to introduce witnesses to testify. Mr. Nortman told me that the earliest possibility I would find out who they intended to call or what evidence they intended to offer would be today at 3:15.

Now, my understanding --

THE COURT: Do you wish to present any witnesses: They have decided to rest on the record as it now exists, and that is for better or for worse.

If you wish to present witnesses, I will permit you to do so, as I told you.

MR. SLOAN: Your Honor, at this point I wish to proceed as though this were a trial. I would wish to make a motion to dismiss the complaint on the ground that no evidence has been offered in support -- not competent evidence has been introduced in support of an injunction.

You can't cross-examine an affidavit, so in a hearing of this sort, an affidavit does not constitute evidence.

I would like to cross-examine the individuals who signed these affidavits that have been presented to the Court, but, of course, it's the Commission's job to call them as witnesses. It's not my job to make their case, and at this point I feel it's appropriate to make a motion to dismiss.

THE COURT: Your motion is denied.

You may proceed.

It is apparent that this sequence of events caught Sloan completely by surprise. After being told that an evidentiary hearing was going to be held, he found himself of being forced to defend in a situation where there was nothing to defend against other than some pieces of paper which contained statements based "upon information and belief."

Judge Ward, as usual, was in error. A federal district court may not grant an injunction unless there has been an evidentiary hearing and, at such a hearing, the burden of proof is on the party seeking the injunction. As the Supreme Court stated in Granny Goose Foods v Teamsters, supra 415 U.S. at 441:

> "Rule 65(b) establishes a procedure whereby the party against whom a temporary restraining order has issued can move to dissolve or modify the injunction, upon short notice to the party who obtained the order. Situations may arise where the parties, at the time of the hearing on the motion to dissolve the restraining order, find themselves in a position to present their evidence and legal

arguments for or against a preliminary injunction. In such circumstances, of course, the court can proceed with the hearing as if it were a hearing on an application for a preliminary injunction. At such hearing, as in any other hearing in which a preliminary injunction is sought, the party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury to it if an injunction is denied and its likelihood of success on the merits."

The Court further observed:

"We cannot accept petitioners' argument that the controlling factor is that the Union had the opportunity to be heard on the merits of the preliminary injunction when it moved in the District Court to dissolve the temporary restraining order. Rule 65(b) does not place upon the party against whom a temporary restraining order has issued the burden of coming forward and presenting its case against a preliminary injunction. To the contrary, the Rule provides that "[i]n case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time..... and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order." The burden was on the employers to show that they were entitled to a preliminary injunction, not on the Union to show that they were not." 415 U.S. at 442-3.

The S.E.C. nevertheless contended that it was entitled to an injunction based upon a record consisting solely of affidavits (A-144). The authority which the S.E.C. cited for this shaky proposition was S.E.C. v Frank 388 F. 2d 486 (2d Cir. 1968) (A-144). However, as counsel for the S.E.C. seemed to recognize, S.E.C. v Frank is generally cited as authority for a contrary proposition. In S.E.C. v Century Investment Transfer Co. (CCH Fed. Sec. Law Rep. ¶93, 232 [1971-72 Transfer Binder]) Judge Motley observed:

"Despite the S.E.C.'s argument to the contrary, the rule in this Circuit now appears to be that an application for a preliminary injunction in securities cases must meet the traditional equity requirements for preliminary injunctions in general. In S.E.C. v Frank 388 F. 2d 483 (1968) the Second Circuit Court of Appeals concluded that Sec. 20(b) of the Securities Act, 15 U.S.C. 77(t)(b), and Sec. 21(e) of the Exchange Act, 15 U.S.C. 78 u(e), do not modify the basic

principles governing equitable relief. (Id. at 491).

> The Court ruled that the statute's language granting the S.E.C. an injunction upon proper showing affords no sufficient basis for concluding that Congress meant special weight to be given the Commission's decision to allow its staff to institute suit."

Similarly, in S.E.C. v Spectrum, Ltd. 489 F. 2d. 535 (2d Cir. 1973) this Court stated:

> "Accordingly, since oral testimony is a medium for superior evaluating credibility than the cold written word, we consider an evidentiary hearing essential to the proper disposition of this case. See S.E.C. v Frank 388 F. 2d 486 (2d Cir. 1968)."

The fact is that it has never been the rule in this Circuit that the S.E.C. may obtain a preliminary injunction without eliciting live testimoney from witnesses. Furthermore, even if there were such a rule, that rule would be overruled by Granny Goose Foods, supra. Therefore, the district court must be reversed.

Although this point should dispose of the matter, it is worth going one step further to observe that any attempt by the S.E.C. to "prove" a violation of Rule 15c2-11 would fail because of the impossibility of proof. The affidavit of Spindler illustrates this point. Spindler said that he received from the NQB "applications submitted by Sloan" (A-7) and that "Sloan did not provide any financial information with these applications" (A-8). This was obvious hearsay, based, according to the affidavit of Spindler, upon "information received from the NQB." Clearly, at any evidentiary hearing, that testimony would have been stricken.

Even if the S.E.C. had produced someone from the NQB to testify on this point, that would still not prove anything. The submission

of a quotation application, even without financial information, does not even arguably constitute a violation of Rule 15c2-11.

At the end of his affidavit, Spindler says:

> "Unless defendant Sloan & Co. and Sloan are enjoined, members of the public may become victims of an unscrupulous scheme." (A-26)

What the scheme is though, Spindler does not say. As this Court observed in Segal v Gordon et al 467 F. 2d 602 (2d Cir. 1972):

> "It is a serious matter to charge a person with fraud and hence no one is permitted to do so unless he is willing to put himself on the record as to what the alleged fraud consists of specifically." 467 F. 2d. at 607.

Rule 15c2-11 has such a garbled and uncertain meaning that, while almost any quotation could possible be in violation of some aspect of the rule, it would be virtually impossible, under the Federal Rules of Evidence, to prove that a particular quotation does violate the rule. For example, on "cross", Spindler stated:

> "I examined the listing application, reviewed it and found that if the quotation was published that it would most likely be in violation of Rule 15c2-11." (A-130) (emphasis supplied).

Thus, Spindler admitted that he was unable to determine if Sloan had violated Rule 15c2-11. This is significant because the only person in the world with the official authority to decide when a violation of Rule 15c2-11 has occurred is Spindler himself. When asked who determines the policy of the S.E.C. with respect to the processing of Form 211, the NQB form through which the S.E.C. "enforces" rule 15c2-11, Spindler testified: "I act fairly independently." (A-137).

The fact is that it has long been the practice of the S.E.C. to assign relatively low level employees to the task of writing opinion

letters, no-action letters, letters of comment and the like concerning obscure points involving the S.E.C.'s "regulatory scheme." Spindler is one such low level employee. Clearly, if Spindler, with his point of vision, is unable to determine that the rule has been violated, this Court cannot do so either. Therefore, Rule 15c2-11 must be declared unconstitutionally vague. Papacristou v City of Jacksonville 405 U.S. 156, 162 (1972).

The points raised in this brief are non-trivial. The S.E.C. has used the injunction now on appeal to this court as a basis to bar Sloan for life from association with a broker or dealer. The decision of the S.E.C. Commissioners stated:

> "Hence we find, as did the administrative judge, that it is in the public interest to revoke registrant's broker-dealer registration and to bar Sloan himself from association with any broker or dealer. In arriving at that conclusion we have given some weight to the fact that in January of this year Sloan was again enjoined on our complaint. That second injunction:
>
> (A) Restrains Sloan from removing, destroying, or altering the books and records required by Section 17(a) of the Exchange Act and our rules thereunder;
>
> (B) Orders him to permit our staff to make an immediate examination of those records in an easily accessible place; and
>
> (C) Restrains him from initiating quotations for over-the-counter securities when he lacks the information required by our Rule 15c2-11 under Section 15(c)(2) of the Exchange Act. 27/"
>
> "27/ S.E.C. v Sloan, 74 Civil 5729 (U.S.D.C., S.D.N.Y.). Sloan's appeal from the second injunction is pending before the United States Court of Appeals for the Second Circuit. Yet the fact remains that a court of competent jurisdiction found the second injunction appropriate and that it did so over Sloan's vehement opposition. That is a circumstance to be considered in assessing the requirements of the public interest. Compare Summit Equities Corp., Securities Exchange Act Release No. 10366 (August 28, 1973), 2 SEC Docket 347."

to see whether Congress has indicated a general policy and

Therefore, the decision of this Court on whether to reverse Judge Ward's decision is likely to have a profound effect on Sloan's future since the decision of the S.E.C. is also subject to review by this court. It is manifestly obvious that Judge Ward's decision must be reversed. Sloan walked into the courtroom on January 17, 1975 expecting to hear testimony from witnesses called by the S.E.C. Spindler, Dolan and Selvers all were in the courtroom throughout the so-called hearing, yet none of them were called to testify. Consequently, Sloan was denied the constitutional right to be confronted with the witnesses against him; a right which the Supreme Court has been zealous to protect. Greene v McElroy 360 U.S. 474, 496, 497 (1959). Under the best evidence rule, if under no other rule, Judge Ward's decision must be reversed.

In Greene v McElroy the Supreme Court stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is unture. While this is improtant in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formaliced these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion."

The Supreme Court further quoted an authority who stated:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

(360 U.S. at 497).

The S.E.C. rested its case on affidavits of Spindler, (A-22), Dolan (A-18) and Selvers (A-34). All three were in the courtroom during the so-called "hearing" but the S.E.C. did not call any of them as witnesses. No effective cross-examination was possible. For example, although the affidavit of Spindler was based upon "information received from the NQB" (A-22), the court sustained objections on the grounds of "hearsay" when Sloan pressed Spindler for details concerning what information he had received from the NQB (A-140 and A-142-143). Furthermore, the Court would not permit any "cross-examination" of Selvers (A-144 to A-146) even though the Court had previously indicated it would accept the statements of Selvers as being true because Selvers was an officer of the Court (A-134-135).

This case involves a sorry example of ex parte collusion between a United States District Judge and an agency of the United States Government. At the so-called "hearing" it was apparent that Judge Ward had directed the S.E.C. on an ex parte basis to have Spindler and Dolan present in the courtroom. In an off-the-record discussion, the S.E.C. indicated that it was going to ask Judge Ward to "excuse" Spindler and Dolan because they had "more important" things to do back at the S.E.C. This demonstrates that it was Judge Ward's idea for Spindler and Dolan to be present in the courtroom. This also demonstrates that Judge Ward had told the S.E.C., on an ex parte basis, that he would grant the application by the S.E.C. without requiring the S.E.C. to call any witnesses. This is a reasonable inference in any case because the S.E.C. has in at least 50 previous applications for a preliminary injunction, started off by putting a witness on the

stand, and it is obvious that the S.E.C. somehow knew that in this particular case no oral testimony would be necessary.[12] This circumstance emphasizes the point that on remand this case should be assigned to a new judge. United States v John Anthony Taylor 487 F. 2d.307 (2d.Cir. 1973).

POINT VI

THE DECISION OF THE COURT FAILS TO COMPLY WITH RULE 52(a) F.R. CIV. P.

It is of the highest importance to proper review of actions of the Federal district court in granting or refusing an injunction that there should be fair compliance with the requirement of Rule 52(a) F.R. Civ. P. with regard to a separate statement of findings of fact and conclusions of law. Mayo v Lakeland Highlands Canning Co.309 U.S. 310 (1940); Brown v Quinlan Inc. 138 F. 2d. 223 (7th Cir., 1943). In an action for an injunction to restrain violations of certain sections of a regulation promulgated by an administrative agency, there is necessity for clear and explicit findings of fact as to what the violations were, if any. Bowles v Russell Packing Co. 140 F. 2d. 354 (7th Cir. 1944). Where the district court enjoined defendants without any comment as to the reason or the legal basis

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12. The docket sheet discloses that there has been at least one subsequent ex parte communication. It appears from the docket sheet that a "pre-trial" conference has been held in this case although the Court never notified Sloan of the scheduling of a pre-trial conference nor was Sloan ever informed that a pre-trial conference had been held or what, if anything, took place. Sloan could not have attended in any case since he was in Lynchburg, Virginia convalescing from injuries sustained because of an automobile accident. While scheduling an ex parte pre-trial conference, Judge Ward has refused to transfer this case to the Western District of Virginia, Lynchburg Division.

for ruling, an injunction should be vacated because of district courts failure to comply with Rule 52(a) United States v Rohm & Haas Co. 500 F. 2d 167 (5th Cir. 1974). Where allegations of the complaint bring it within the general rule that equity will not enjoin enforcement of criminal statute and case is an appropriate one for the issuance of a temporary injunction, trial court should make findings in compliance with Rule 52(a). Pacific American Fisheries Inc. v Mullaney 191 F. 2d 137 (9th Cir. 1951). An interlocutory or other injunction should not be filed unless findings of fact and conclusions of law are filed with the decree. United States v Ingersoll-Rand Co. 320 F. 2d 509 (3rd Cir. 1963).

An agreement between the parties that the district court need not enter findings of fact is not effective as requirement of Rule 52(a) is mandatory. Berguido v Eastern Air Lines Inc. 369 F. 2d 874 (3rd Cir. 1966) rehearing denied 378 F. 2d 369 cert denied 390 U.S. 996 rehearing denied 391 U.S. 909 rehearing denied 392 U.S. 917. It is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all, including the public, whose interests may be affected by the injunction. Inland Steel Co. v United States 306 U.S. 153 (1939).

The principle argument advanced by the S.E.C. is that there is great public interest involved in this litigation. However, this great public interest itself requires the entry of findings of fact and conclusions of law in conformity with Rule 52(a) F. R. Civ. P. Absent findings of fact, there is no way that the appellate courts can determine that the injunction serves any rememdial purpose to prevent the re-occurrance of past violations of securities laws. Without specific facts, the court cannot draft an injunction

order to comply with Rule 65(d) F.R. Civ. P. Hodge v Field 320 F. Supp. 775 (1968) aff'd 435 F. 2d 1309 (9th Cir. 1968). See also United States v Ward Baking Co., 376 U.S. 327, 331 (1964); Associated Press v United States 326 U.S. 1, 22 (1946).

As a matter of form, Judge Ward's oral decision, read into the record (A-172 to A-174), does not meet the standards set by Rule 52(a). Rule 52(a) requires that the court shall file findings of fact. Sampson v Murray, supra 415 U.S. at 98 (Marshall, J., dissenting). An oral decision, until it is reduced to writing, cannot be filed. Since no decision had been filed in this case, Judge Ward had no authority to sign the order of injunction.

This is not a mere technical requirement (see Schmidt v Lessard 414 U.S. 473, 476 (1974)). Oral decisions constitute a significant hinderance to appellate review. For example, in the case at the bar, Sloan immediately moved the Court of Appeals for a stay of Judge Ward's order. However, Sloan could not include a copy of Judge Ward's decision in his motion papers because the court reporter had not yet made a transcript. Furthermore, there is a significant likelyhood that the court reporter would make an error, since court reporters frequently make errors in the transcription of oral testimony, and even a minor error could destroy any value the court's decision might have for purposes of appellate review. In addition, for policy reasons, oral decisions should be discouraged by the appellate court. When a judge makes an oral decision, he can be certain that the decision will not be published. This saves the judge from considerable embarrassment if he happens to be reversed by the Court of Appeals. It also deprives the world of the opportunity to read the handiwork of an incompetant judge. Therefore, when a judge feels that he is likely to be reversed, or

when he makes a bad decision which he would prefer not to have published, he is more likely to make the decision orally. Judges should be given as little opportunity as possible to make bad decisions. The principal coercive force which encourages a district court judge to do his best to make the right decision lies in the fact that if he does not do so, the Court of Appeals will inform him publically that he is wrong. Chandler v Judicial Council, supra 398 U.S. at 101 (Harlan, J., concurring). There are probably instance in which an oral decision is appropriate but a decision involving the grant of injunctive relief is not one of them.

The only "fact" which Judge Ward seems to have "found" was that Sloan told Spindler that he "intended to violate Rule 15c2-11." (A-173). However, Spindler testified that he could not remember what Sloan actually said (A-124-125). His most definate statement came when he testified:

> "It may have been a response to my question, 'Do you intend to wilfully violate the rule,' his answer would have been 'yes.' If he didn't use those words, it would have been in response to my question. " (A-124).

This statement came in sharp contrast to Spindlers affidavit where he seemed to have a clear recollection of what Sloan said (A-24, ¶9). Furthermore, Spindler testified that he could not recall what had been said in several subsequent conversations which had taken place between Sloan and himself. (A-126). In fact, Spindler displayed almost a total inability to recall any facts related to this case beyond what he had said in the affidavit.

It seems that the only finding Judge Ward was able to make in this case was based on what Sloan had supposedly said to Spindler. However,

any statements which Spindler made to Sloan were inadmissible on the grounds of hearsay. This is particularly true in view of Spindler's inability to recall what it was that Sloan said. It seems that Sloan said "yes" in response to a question posed by Spindler. Questions in general and particularly questions posed by the S.E.C. often have a double meaning[13] and, in view of Spindler's inability to recall what he had asked, it is not possible todetermine what significance, if any, Sloan's answer might have had.

In any event, statements made by Sloan were protected by his First Amendment right to Freedom of Speech. In order for the S.E.C. to be entitled to an injunction it must show that Sloan's conduct was illegal. United Transp. Union v State Bar of Michigan, supra. In the past, the Supreme Court has refused to adopt a standard of a criminal statute which regulates pure speech. See Abrams v United States 250 U.S. 616, 626-627 (1919) (Holmes, J., dissenting) See also Rogers v United States ____U.S.____, 45 L. Ed. 2d 1, 11 (1975) (Marshall, J., concurring). Even if Sloan had greeted a call from the S.E.C. with loud and vociferous, or obscene, vulgar or indecent language or

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13. In S.E.C. v Samuel H. Sloan & Co., supra, much of the S.E.C.'s case turns on the "yes" or "no" response made by Sloan to questions which were posed in the course oral depositions taken at the offices of the S.E.C. The questions posed by the S.E.C. often had two, three or even four possible meanings. In view the large number of questions of this character it can be seen that the S.E.C. poses such questions as part of a deliberate strategy to enable it to come into court at a later date and claim that Sloan said something that he did not say. For a more complete analysis of this point, see the brief filed by Sloan in S.E.C. v Samuel H. Sloan & Co. in which Sloan moved under Rule 60(b)(3) to vacate the judgment on the grounds of fraud, misrepresentation and other misconduct of an adverse party.

if he had sworn or cursed or yelled or shrieked at the S.E.C. he could not be made subject to an injunction based upon a criminal statute administered by the S.E.C. Gooding v Wilson 405 U.S. 518 (1972); Committee to End War in Vietnam v Gunn 289 F. Supp 469 (1968) appeal dismissed 399 U.S. 383 (1970). There can be little doubt that the ability of the S.E.C. to find a criminal violation of some S.E.C. rule in almost any conduct which a broker dealer might undertake has a "chilling effect" on the exercize of First Amendment freedoms. See Laird v Tatum 408 U.S. 1, 16 (1972) (Douglas, J., dissenting) and cases cited therein. As a matter of pure observation, it can be seen that the brokerage industry rarely criticizes the S.E.C. whereas the S.E.C. is almost continuous in its abuse and criticizism of the brokerage industry. It has been said that the S.E.C. has on several occasions commenced proceedings against a broker solely because some employee of that broker displayed discourteous conduct towards and S.E.C. investigator. Therefore the claim that the existance of the S.E.C. infringes upon First Amendment freedoms is appropriately made in this case.

In sum, regardless of what Sloan said, his statements would not form the basis for an injunction absent a showing that Sloan's conduct was illegal. Judge Ward's decision does not make any such showing which meets the standards set by Mayo v Lakeland Highlands Canning Co.[14] and the other cases previously cited.

14. Another unsupported finding in Judge Ward's decision is that, unless enjoined, Sloan will continue to violate S.E.C. rules. However, the S.E.C. contended that Sloan would continue to violate S.E.C. rules regardless of whether or not he was the subject of an injunction (A-97). Under these circumstances, injunctive relief is clearly unavailable. A court may not grant an injunction unless there is a specific finding that the respondent will cease his illegal conduct if he is enjoined.

POINT VII

THE ORDER OF INJUNCTION FAILS TO MEET THE REQUIREMENTS OF RULE 65(d) F.R. Civ. P.

The judgment entered in this case is invalid on its face for many reasons. To begin with, the order is a judgment. This is a clear error as Judge Ward himself seems to realize when he refers to the judgment as a "preliminary injunction." Ante p. 8. At oral argument before this Court on Sloan's motion for a stay, counsel for the S.E.C., Thomas L. Taylor, III, confessed the error of the district court but argued that a stay of the injunction would be inappropriate because the injunction could be resettled in the district court. However, after the motion for a stay had been denied, the S.E.C. made no attempt to resettle the order of injunction in the district court and when Sloan made a motion in the district court to vacate the judgment of injunction, the S.E.C. argued that "defendants motion to vacate this Court's order of injunction entered on January 20, 1975 for failure to comply with Fed. R. Civ. P. 65 was already presented to the Court of Appeals in defendants' motion for a stay of the injunction pending appeal and denied by the Court on February 13, 1975." Brief of the S.E.C. dated July 3, 1975 p. 9. Thus the anomalous situation arises where the S.E.C. has confessed that it is not entitled to a final judgment based on the record of this case and yet it has successfully argued that no steps should be taken by the district court to correct this confessed error.

Aside from the fact that the injunction was improperly entered as a judgment, one of the more glaring improprieties in the injunction lies in the fact that the injunction incorporates by reference a seven

page document, namely Securities Exchange Act Release No. 9310 (A-39 to A-45), which is physically attached to the order of injunction. According to the S.E.C., Sloan is supposed to read this seven page release and not do whatever it is that this release says that he should not do. However, Sloan testified that he and other brokers cannot, from reading the rule, determine what conduct might constitute a violation of this rule (A-157 to A-165). The S.E.C. has expressed no dissagreement on this point. Therefore, the order of injunction is a nullity in that it puts the parties right back where they were when this lawsuit was commenced. At the commencement of this lawsuit, the S.E.C. contended that Sloan had violated Rule 15c2-11 and Sloan contended that he had not done so. Assuming that there were no facts in dispute and that the questions involved were solely questions of law and in view of the fact that Judge Ward made no adjudication of the question of whether Sloan had actually violated the rule, the injunction left Sloan free to continue to submit quotation applications consistant with his position that his conduct did not violate Rule 15c2-11.

Rule 65(d) F.R. Civ. P. expressly prohibits incorporating documents "by reference" into the injunction. The purpose of Rule 65(d) is to enable a person reading the order of injunction to know what act or acts were to be restrained without being referred to the complaint or other document for that information. Seagram-Distillers Corp. v New Cut Rate Liquiors, Inc. 231 F. 2d 815 (7th Cir. 1965) cert. denied 350 U.S. 828. It is particularly inappropriate for an injunction to incorporate by reference various S.E.C. rules since these rules are in a constant state of flux. Only a specialist could be expected to keep track of all of the changes which take place in the

numerous S.E.C. rules. Because the rules are constantly changing, a course of conduct which presently violates some S.E.C. rule might not, in the future, constitute a violation of that rule. On the other hand, conduct which does not at present constitute a violation of a rule might, in the future, constitute a rule violation. For example, if the S.E.C., at some future date, were to amend Rule 15c2-11 so as to make it against that rule to quote any security with a price of less than $5, Sloan might suddenly find himself subject to a contempt proceeding where he would be trapped in a situation where he could not challange the constitutionality of an obviously invalid rule. See Yakus v United States, supra. In such a situation, Sloan could be deprived of his liberty as well as his Sixth Amendment rights for doing something which was not against any S.E.C. rule at the time Judge Ward signed his order.

The circumstances of this case illustrate this point. According to the terms of the injunction, Sloan is:

> (a) ordered to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. (or any other broker or dealer registered with the Commission of which Samuel H. Sloan may become a principal or controlling person) as required by Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-4;

However, on June 5, 1975, Congress amended Section 17(a). The new 17(a) does not contain the last sentence of the old 17(a). That was the sentence which stated that the books and records of a broker or dealer shall be subject to periodic examination by representatives

of the S.E.C. (See ante p. 3). Thus, assuming that the injunction were not otherwise invalid, the terms of the injunction in its present form does not require Sloan to permit the S.E.C. to examine his books and record.[15]

Undoubtedly, the S.E.C. will disagree on this point because the S.E.C. contends that Rule 17a-4 (17 C.F.R. 240.17a-4) requires a broker dealer to permit the S.E.C. to examine his records. However, the relevant sentence of Rule 17a-4 simply states that a broker shall keep his records in an "easily accessible place." The rule says nothing about that place being easily accessible to the S.E.C. (See A-20, ¶8 and A-61). While the S.E.C. might be correct in its argument that irrespective of what the rule says, the intent of the rule is that the records should be easily accessible to the S.E.C.,[16] the point is that according to Rule 65(d) the injunction must state explicitly what Sloan can and cannot do and the injunction in this case fails to do so.

A case in point is International Longshoremen's Asso. v Marine Trade Asso. 389 U.S. 64 (1967). There counsel for the enjoined party repeatedly asked the court what the injunction meant to which the court replied: "That you will have to determine, what it means" and "you read the English language and I do." 389 U.S. at 70. However, the

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15. The change in question occurred because of the decision to delete the last sentence of the old §17(a) and to incorporate this sentence into a new §17(b). The new §17(b) is lengthly and qualifies, in certain ways, the power of the S.E.C. to conduct examinations. The old §17(b), incidently, is called §17(f) in the amended version of the Exchange Act.

16. It is obvious, however, that this is not the intent of the rule. Brokers are scattered to the far corners of this nation and any rule which would require all brokers to keep records in a place easily accessible to the S.E.C. would be invalid. This point is appropriately raised here because the present position of the S.E.C. seems to be that it is unwilling to come to Lynchburg, Virginia to see Sloan's records but rather is attempting to demand that Sloan bring his records to New York.

Supreme Court, which is presumably capable of reading the English language, was unable to determine what the injunction meant.[17] It therefore reversed the lower court stating:

> "The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." 389 U.S. at 76.

There is nothing in the record which indicates that Judge Ward read Rule 15c2-11 or Rule 17a-4. In fact, Judge Ward signed the order of injunction so quickly that, in spite of his self serving statement to the contrary (A-175), it was obvious that Judge Ward did not even read the order which he signed. This would explaint the fact that Judge Ward referred to the order as a "preliminary injunction" (A-175) whereas the order itself was not a preliminary injunction but rather was what the S.E.C. refers to as a "permanent injunction."[18] The order of injunction does nothing more than tell Sloan not to violate S.E.C. rules and does not state, in reasonably specific terms, what conduct would constitute a violation of those rules. Therefore, under Schmidt v Lessard, supra the injunction in this case must be vacated.

POINT VIII

S.E.C. RULE 15c2-11 IS A NULLITY BECAUSE THE S.E.C. EXCEEDED ITS STATUTORY AUTHORITY IN PROMULGATING THAT RULE.

It has already been suggested that Rule 15c2-11 is "void for

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17. Mr. Justice Douglas dissented because he was unable to determine that the document in question was an injunction.

18. Incidently, the term "permanent injunction " cannot be found anywhere in Moore's Federal Practice and it seems that only the S.E.C. has the ability to obtain the relief of a "permanent injunction." The better term is, of course, a "final injunction."

vagueness." (ante, p. 50). However, it is unnecessary to reach that determination because Rule 15c2-11 is void for another reason. The fact is that Congress never authorized the promulgation of a rule such as Rule 15c2-11.

The Report of the Senate Committee on Banking, Housing and Urban Affairs which accompanied S249, otherwise known as the Securities Acts Amendments of 1975, had this to say about Rule 15c2-11.

> "Similarly, Rule 15c2-11 adopted pursuant to Section 15(c)(2) of the Exchange Act, prohibits brokers and dealers from initiating market making activities when certain financial and other information about a security and its issuer are not available. Generally, the type of information required is that which would be disclosed in a registration statement filed under the Securities Act of 1933 or in the periodic reports filed under the Exchange Act. Municipal securities and their issuers generally are, and will continue to be, exempt from the registration and reporting requirements of the Securities Act of 1933 and the Exchange Act. Rule 15c2-11 type information is therefore generally not available for municipal securities and their issuers. Upon enactment, the effect of S. 249 on Section 15(c)(2) and Rule 15c2-11 would be, among other things, to preclude brokers and dealers from submitting quotations on most issues of municipal securities. This would have very serious adverse consequences. The Committee expects, therefore, that, immediately upon enactment of S. 249, the Commission will exempt municipal securities from Rule 15c2-11." S. Report No. 94-75, 94th Congress, 1st Sess. p. 48 (1975).

In spite of the language of this report, the S.E.C. has yet to amend Rule 15c2-11 in accordance with the wishes of Congress. This circumstance serves to illustrate the point that Congress, by giving the S.E.C. rule making authority, has created a monster that it cannot control. Only the courts can declare a rule invalid, and this Court must do so in this case.

The S.E.C. has taken the position that a private party has standing to challenge an S.E.C. rule only when named as a defendant in a proceeding brought by the S.E.C. to enforce violations of that rule. PBW Stock Exchange Inc. v S.E.C. 485 F. 2d 718 (3rd Cir. 1973); Brief for the S.E.C. in Sloan v S.E.C. et al, supra. In determining the validity of an administrative regulation, the courts must look

to see whether Congress has indicated a general policy and whether the administrative agency has acted within the limits of the power conferred. See United States v Robel 389 U.S. 258, 274-275 (1967) (Brennan, J., concurring) and the cases cited therein. It has been established that an administrative regulation, which operates to create a rule out of harmony with the statute authorizing it, is a nullity. Manhattan General Equipment Co. v Commissioner 297 U.S. 129 (1936).

In the case at the bar, the invalidity of the rule is rather obvious. Section 15(c)(2) of the Exchange Act only gives the S.E.C. the right to define, by rules and regulations, "such acts and practices as are fraudulent, deceptive or manipulative and such quotations as are fictitious." (See A-164). Rule 15c2-11 fails to do this or at least it fails to do so in a manner in reasonable conformity with the accepted meaning of the terms "fraudulent," "deceptive," "manipulative" and "deceptive" in the English language.

For one thing, sub-section (d) of Rule 15c2-11 requires a broker to submit "information regarding the security" to the "inter-dealer-quotation-system" at least 2 days before the publication of the quotation. This gives rise to the "quotation applications" which, according to the S.E.C., Sloan submitted in what "might have been" a violation of Rule 15c2-11.

If the rule required that the quotation applications be submitted directly to the S.E.C., then the rule might be reasonable. In such a case, the S.E.C. would be in the position of granting or denying the application and the broker or dealer would be able to determine where the S.E.C. stood with respect to his application. Furthermore, the

denial of a quotation application could be challenged in court. However, such a rule would not conform to the policy of the S.E.C. The policy of the S.E.C. is never to go on record as to whether prospective conduct will violate a rule of the S.E.C. In this way, the S.E.C. leaves all brokers and dealers in a state of perpetual suspense.

The practical consequence of Rule 15c2-11 is that whenever a broker desires to list a security in the pink sheets he must submit a Form 211 to the NQB. However, the NQB is nothing more than a publishing company and has no interest in receiving any information about a security other than the correct spelling of its name. Therefore, the NQB simply forwards to the S.E.C. in toto all Forms 211 received from brokers or dealers. Every day, Spindler goes through the myriad of Forms 211 that he receives from the NQB. If he discovers a Form 211 which he considers displeasing to the S.E.C., he calls the broker or dealer and "requests" that the broker or dealer "withdraw" the Form 211. Most brokers and dealers do not hesitate to take the hint and withdraw their Form 211 without question. Sloan himself complied with this procedure from 1971 when the rule was promulgated until one day in 1974 when he decided to challenge this entire procedure by refusing to comply with the "request" of the S.E.C. to "withdraw." It should be noted that the action now on appeal represents the first time the S.E.C. has come to court with a complaint alleging that a broker or dealer has violated Rule 15c2-11.

There can be no doubt that the application of Rule 15c2-11 has a chilling effect on the exercize of freedoms generally acknowledged to be guaranteed by the constitution.[19] Moreover, Rule 15c2-11 is entirely

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19. In a typical judicial error, Judge Ward refused to hear testimony which would have given added support to the argument that Rule 15c2-11 is unconstitutional as applied (A-133). This error is appealable.

contrary to the public interest. Rule 15c2-11 is, in fact, the product of an illegal scheme to raise revenues for the S.E.C. The victims of this scheme are individual investors who are not in any way associated with any wrongdoing.

The intended effect of Rule 15c2-11 is to prohibit as much as possible trading in a security unless the issuer of that security has currently on file with the S.E.C. a registration statement or similar report which is in accordance with the Securities Act of 1933 or the Exchange Act. Not coincidently, every registration statement or report filed with the S.E.C. necessitates the payment of a filing fee which can vary from $250 to $1,000 (A-154 to A-156). According to the 1974 annual report of the S.E.C., the S.E.C. received $22,100,000 during the preceding fiscal year from the payment of these and similar filing fees. This accounted for most of the revenue needed to operate the S.E.C. for that year.

In Federal Power Commission v New England Power Co. 415 U.S. 345, 350 n 4 (1974) the Supreme Court observed that it was improper for the S.E.C. to charge these fees. However, consistant with the position it has taken in other instances, the S.E.C. continued to engage in illegal conduct. Presumably the threat of criminal penalties if the fees are not paid combined with the fact that it would cost more than $1,000 to hire a lawyer to challenge the fees in question have combined to discourage anyone, save Sloan, from challenging these fees in court.

The persons who suffer if the fees are not paid are not the putative wrongdoers, i.e., the officers of the corporations which do not pay the fees and do not file the reports on time, but the innocent public

stockholders.[20] In the case at the bar, Sloan was attempting to perform a public service (A-78, A-168) by rehabilitating approximately 300 securities which the S.E.C. had in the past suspended from trading for non-payment of the required fees. This conduct should have been applauded rather than condemned by the courts.[21]

Returning to the original point of this section of this brief, Rule 15c2-11 is not authorized by §15(c)(2) of the Exchange Act and therefore is a nullity.

POINT IX

THE "MANDATORY INJUNCTION" ENTERED IN THIS CASE AS WELL AS §17 OF THE EXCHANGE ACT ARE INVALID UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION.

See v City of Seattle 387 U.S. 541, 543 (1967) established the rule that warrantless administrative searches are invalid under any circumstances. This rule was affirmed in California Bankers Association v Schultz, supra. In See the Supreme Court stated:

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20. Officers of public corporations are bound by the insider trading rules and therefore cannot own "free-trading" stock. In addition, the stock owned by the officers of public corporations will generally be unregistered and restricted or legended and therefore unsaleable in the public trading markets.

21. The claim by the S.E.C. that the public is somehow "protected" by the filing of the reports is specious. It has been established by statistical surveys that only a miniscule percentage of public stockholders of a 12(g) reporting corporation will show sufficient interest to obtain a copy of the 10-K report filed with the S.E.C. Moreover, in order to obtain a copy of any document filed with the S.E.C., one must purchase it from Disclosure, Inc., a private corporation to which the S.E.C. has granted a monopoly on the reproduction of documents filed with the S.E.C. The rate which Disclosure, Inc. charges is $0.15 per page. Even the photocopy machines found in the public reference room of the S.E.C. are owned by Disclosure, Inc. In return for this monopoly, Disclosure, Inc. agrees to microfilm, on behalf of the S.E.C. and at no cost, every document filed with the S.E.C. and to perform other "free" services for the S.E.C.

"The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable office entries upon his commercial property. The businessman, too, has that right placed in jeprody if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." 387 U.S. at 543.

The next three paragraphs of this decision made it clear that the Fourth Amendment protects a businessman from a warrantless "persual of financial books and records" by an "administrative agency" seeking "to enforce a variety of regulatory laws."

If this decision leaves any doubt on this subject, that doubt is erased by California Bankers Association v Schultz. It is true that the banks lost in a sharply contested 5-4 decision in which two of the majority concluded that a "significant extention of the regulations reporting requirements --- would pose substantial and difficult constitutional questions." 416 U.S. at 78. However, the banks lost because of the unavailability to the banks of Fourth andFifth Amendment arguments. Specifically, the banks, as corporations, do not possess any Fourth and Fifth Amendment Constitutional rights, 416 U.S. at 55, nor do they have the standing to assert these rights in behalf of their customers. 416 U.S. at 72. Contrawise the customers have no standing to intervene and defeat disclosure by the banks. 416 U.S. at 53. At the same time, the California Bankers majority distinguished Boyd v United States 116 U.S. 616, 622 (1886) where the Supreme Court observed:

"a compulsary production of a man's private papers to establish a criminal charge against him--- is within the scope of the Fourth Amendment to the Constitution....."

That citation is controlling here where the S.E.C. is seeking to examine Sloan's books and records for the specific purpose of developing evidence in order to put Sloan in jail. At the outset, counsel

for the S.E.C. stated:

> "We also seek a mandatory order so that we may inspect Mr. Sloan's books and records to see whether he is in compliance with other provisions of the Federal Securities laws as well as the previous Court order." (A-53).

This statement leaves no doubt that the S.E.C. wishes to see Sloan's books and records in view of a prospective motion for an order holding Sloan in criminal contempt. Clearly, a motion for civil contempt would be unlikely because it would hardly be appropriate for the Court to order that Sloan be imprisoned until he, for example, brings his books up to date.

It has often been said that if the S.E.C. or the NASD looks at the books of any broker or dealer hard enough, it will find a record keeping violation. Furthermore, in the past, the S.E.C. has used testimony which was perjured or which was based entirely on hearsay evidence in order to build a case against Sloan. Under these circumstances, Sloan does not hold the "keys to his freedom in his pockets" because, if he surrendered his books and records to the S.E.C., he would actually be locking himself in and throwing the keys to his freedom away. In short, this case provides a classic instance where a claim of Fifth Amendment self incrimination privilege is available.

In the case of criminal investigations, which includes any investigation for violations of the Exchange Act, a search warrant is required by the Fourth Amendment in all but a few "specifically established and well-delineated exceptions." Katz v United States 389 U.S. 347, 357 (1967). No such exceptions exist here. Engaging in a securities transaction is not itself a criminal act, Carroll v United States 267 U.S. 132 (1925) or at least the S.E.C. has not promulgated a rule to that effect. Securities transactions, as such, do not endanger the lives of anyone. See, Warden Maryland Penitentiary v

Hayden 387 U.S. 264 (1967). The principles set forth in United States v. United States District Court 407 U.S. 297 (1972) are especially applicable here. Warrantless searches by S.E.C. investigators ignore the value to a free society of a "neutral and detached magistrate." Coolidge v New Hampshire 403 U.S. 443, 453 (1971). "[A]dministrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment." Camara v Municipal Court 387 U.S. 523 (1967). Furthermore, the Exchange Act undermines the "required reports" standards set forth in Shapiro v United States 335 U.S. 1 (1948); Marchetti v United States 390 U.S. 39 (1968); and Grosso v United States 390 U.S. 62 (1968).

By his decision to become a broker or dealer, Sloan did not waive any of his constitutional rights. Sloan is not a member of the NASD or any other"prestigue giving"organization. In fact, by refusing to permit Sloan to withdraw as a broker or dealer (A-151) the S.E.C. has subjected Sloan to slavery or involuntary servitude.

POINT X

ON REMAND, THE COMPLAINT OF THE S.E.C. SHOULD BE DISMISSED.

The recent Securities Acts Amendments incorporates a seemingly minor but highly significant change in §21(e) of the Exchange Act. This change involves the substitution of the words "such a" in place of "a proper." Undoubtedly, this change was the result of successful lobbying by the S.E.C. but it has consequences no doubt unforseen by the S.E.C. To begin with, defendants in injunction actions brought by the S.E.C. now have an absolute right to a jury trial. Curtis v Loether 415 U.S. 189 (1974). In remanding this cause, the court

should point this out to prevent this case from being tried by the wrong trier of the fact. Beacon Theatres v Westover 359 U.S. 500 (1959). More significantly, this change makes an action brought by the S.E.C. for an injunction a "law enforcement proceeding" rather than an action for equitable relief. The Report of the Senate Committee, supra pp. 73, 76 and 77 make this distinction clear. Page 73 states:

> "S.249 would also exempt law enforcement actions brought by the S.E.C. from the operation of the judicial procedures..."

Page 76 states:

> "Private actions for damages seek to adjudicate a private controversy between citizens; the Commission's action for a civil injunction is a vital part of the Congressionally mandated scheme of law enforcement in the securities area."

Page 77 states:

> "Enactment of this provision is essential to provide adequate protection--- through expeditious enforcement of the federal securities laws which it administers."

In short, this minor change in §21(e) of the Exchange Act turns injunction actions brought by the S.E.C. into a criminal prosecution and therefore §21(e) is constitutionally invalid because it abridges the rights guaranteed by the Sixth Amendment to the Constitution.

The complaint of the S.E.C. should be dismissed for a number of other reasons. This is just one of several lawsuits between Sloan and the S.E.C. Equity requires an injunction to avoid a multiplicity of suits. Union Pacific Railway Co. v Cheyenne 113 U.S. 516 (1885); Smyth v Ames 169 U.S. 466, 517 (1898); Beacon Theatres v Westover, supra. The complaint is almost entirely devoid of factual allegations and is wholly insufficient to meet the pleading requirements for actions alleging securities law violations in this Circuit. Shemtob v Shearson Hammill & Co. 448 F. 2d 442 (2d Cir. 1971). The complaint failed to join a necessary party, namely, the NQB, because the true purpose

of this lawsuit was not to prevent Sloan from submitting quotations to the NQB but to prevent the NQB from publishing them. Provident Bank & Trust Co. v Patterson 390 U.S. 102 (1968). Furthermore, mandamus, rather than injunction, is the proper remedy if the S.E.C. has a right to see Sloan's books. S.E.C. v Sharkey, supra. In addition, the S.E.C. is estopped from prosecuting Sloan for violations of §17(a) because the S.E.C. just completed a three year successful prosecution based upon an alleged violation of the same section. The S.E.C. has had a full and fair opportunity to prove its case and is not entitled to a second chance. This is particularly true since, on September 2, 1975, the S.E.C. filed answers to the defendant's interrogatories which indicated that the S.E.C. has offered all the proof that it intends to offer in this case. No showing has been made by the S.E.C. that Sloan engaged in interstate commerce and, for that reason, the federal courts have no jurisdiction to adjudicate this dispute. The S.E.C. has acted vexatiously, wantonly, in bad faith, and for oppressive reasons and therefore Sloan is entitled to an assessment of costs including reasonable attorneys fees against the United States. F.D. Rich v Industrial Lumber Co. 417 U.S. 116 (1974).

CONCLUSION

For all of the reasons set forth above the judgment of the district court should be vacated.

Respectfully submitted,

DATED: September 6, 1975

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APPENDIX

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion , or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury, shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

AMENDMENT IX

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution or prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIII

Sect. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sect. 2. Congress shall have power to enforce this article by appropriate legislation.

SECURITIES EXCHANGE ACT OF 1934

Prior to June 5, 1975, Section 15(c)(2) of the Securities Exchange Act of 1934 stated:

No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fradulent, deceptive, or manipulative and such quotations as are fictitious.

As amended, Section 15(c) (2) states:

No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, decep-

tive, or manipulative act or practice, or makes any fictitious quotation, and no municipal securities dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in connection with which such municipal securities dealer, engages in any fraudulent, deceptive, or manipulative act or practice or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fradulent,(sic), deceptive, or manipulative and such quotations as are fictitious.

Prior to June 5, 1975, Section 17(a) of the Securities Exchange Act of 1934 stated:

Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 15 of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

As amended, Section 17(a)(1) states:

Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer, registered securities information processor, and registered clearing agency, and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and made and disseminate such reports, as the Commission,by rule, prescribes as necessary or appropriate in the public interes, for the protection of investors or otherwise in furtherance of the purposes of this title.

Prior to June 5, 1975,Section 21(e) stated:

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the

district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

As amended, Section 21(e) states:

Wherever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules or a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon such a showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence, as may be available concering such acts or practices as may constitute a violation of any provision of this title or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

Sec v. Sloan

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 280 Richmond Avenue, Staten Island, N.Y. 10302. That on the 12 day of Sept, 1975 deponent served the within Brief upon Securities + Exchange Comm.

attonrye(s) for Appellee

in this action, at 26 Federal Plaza
new york, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
12 day of Sept, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976